No. 517

OCT 18 19

JOHN T. FEY, C

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

F. P. NEWPORT,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of F. P. NEWPORT CORPORATION, LTD., et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MORRIS LAVINE
Attorney at Law
215 W. Seventh Street
Los Angeles, California
TRinity 3241
Attorney for Petitioner.

TOPICAL INDEX

	Page
Jurisdiction	2
Opinion Below (233 Fed. (2) 1944)	2
Statutes Involved	3
Statement of the Case	5
Questions Presented by This Appeal	13
Reasons for Granting the Writ:	15
(1) Several important questions had been decided contrary to *Erie v. Tompkins*, 304 U. S. 64 and Section 1652 Title 28 U. S. Code.	
(2) The decision is contrary to equitable principles decided by this court.	
(3) This court should exercise its supervisory jurisdiction over appeal.	
Argument	15
I. An order rendered by a District Judge and the interpretation of his own order should be heard only by the judge who made the order, if available	15
II. An order made by a District Court Judge and never revoked continues on under its own terms until it is revoked. The sums due under Judge McCormick's order are due and payable to Mr. Newport	19
III. The voluntary benefits accepted by the F. P. Newport estate are such that Newport should be compensated in equity for the preservation and benefits to the entire fund under well known equitable principles	22

Page

Mr. Newport is entitled further to extraordinary fees for services rendered in preserving the whole estate 22

IV. The referee erred in refusing to receive evidence from Mr. Newport and denying the offers of proof made of all of the services and work performed by Mr. Newport 28

Appendix—Opinion ..... App. 1

TABLE OF CASES AND AUTHORITIES CITED

Cases

Central R.R. etc. Co. v. Pettus, 113 U. S. 116, 127 ..... 20, 25

Chapin v. Collard, 189 P. 2d 642 27

Colley v. Wolcott, 187 F. 595 25

Corinne Mill, Canal & Stock Co. v. Toponce, 152 U. S. 495, 38 L. Ed. 493 at 498 27

Defense Supply Corporation v. Lawrence Warehouse Co., 326 U. S. 631, 93 L. Ed. 931 ..... 15, 16

Dodd v. Stellar, 30 Cal. 2d 506 24

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 ..... 13, 27, 30, 31

Ellis v. Atlantic Refining Co., 308 Pa. 237; 163 A. 531, 83 A.L.R. 936 25

Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608 26

Faust v. Faust, 103 Cal. App. 2d 755 16

Hardware Mut. Casualty Co. v. Butler, 116 Mont. 73, 148 P. 2d 563 25

Page
Harris, Appeal of, 323 Pa. 124, 186 A. 92, 96 25
Ide v. Crosby, 104 Fed. 582 17
Imperial Assurance Co. v. Livingston, 8 Cir., 49 F. 2d 745, 74 A.L.R. 1336 29
Klein v. Fleetford, 35 Fed. 98 18
Los Angeles Times Mirror Company v. Superior Court, 3 Cal. 2d 309 30
Lustron Corporation, Re, 196 Fed. 2d 975 27
Marre, Estate of, 18 Cal. 2d 191 25
Muskegon Boiler Workers v. Tennessee Valley I. & R. Co., 274 F. 386 25
Newport v. Sampsell, 233 Fed. (2) 944 2
R. E. Spriggs Inc. v. Industrial Accident Commission, 42 Cal. 2d 785, p. 793 25
Sprague v. Ticonic National Bank, 307 U. S. 161, 83 L. Ed. 1184 ..... 21, 25, 27
Scott v. Superior Court, 208 Cal. 303 25
Trustees Internal Improvement Fund v. Greenough, 105 U. S. 527, 26 L. Ed. 1157 ..... 21, 25
Vangel v. Vangel, 45 A.C. No. 24, p. 828 ..... 22, 24
Vaught v. Charleston National Bank, 62 Fed. 2d 817 at 820 25
Westerly Water Works v. Town of Westerly, 77 Fed. 783, 785 17
Wiegand, In re, 27 Fed. Supp. 725, 729 16
Wilson v. Pittsburgh B. & I., 85 Pa. Super. 537 25
Winslow v. Harold G. Ferguson Corp., 25 Cal. 2d 274, 277; 153 P. 2d 714 25

Authorities

	Page
Bankruptcy Act	
Sections 24 and 25	2, 29
Section 39, Title 11, Sec. 67	18
Section 47, Title 11, Sec. 75	3, 18
Civil Code of California, Section 1589	27
Code of Civil Procedure, Section 3521	28
United States Codes	
Title 28, Section 1252, sub. (3)	2
Title 28, Section 1652	3, 13, 15, 31
14 Am. Jur. Sec. 74	25

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

F. P. NEWPORT,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of F. P. NEWPORT CORPORATION, LTD., et al.,

Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

This is a Petition for Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a judgment and order of the Circuit Court affirming the decision of the Referee in Bankruptcy and reviewed by the District Court Judge denying compensation to the petitioner, who has been instrumental in bringing in more than $2,000,000 to pay off the creditors of the corporation, pay off the secured indebtedness in full with interest and to enable the sale that trebled in the balance the amount due to

unsecured creditors, and to determine if an unrevoked order made by United States District Judge Paul J. McCormick (now retired) to pay Newport compensation continued and should be put into effect.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1252, subdivision (3), U. S. Codes, and Sections 24 and 25 of the Bankruptcy Act.

The order appealed from was rendered by the United States Court of Appeals on June 6th, 1956, rehearing denied on July 6, 1956. The time for filing Petition for Certiorari was extended by Mr. Justice Douglas to October 19th, 1956.

The case proceeded in the United States Court of Appeals for the Ninth Circuit on typewritten record on the case.

OPINION BELOW

233 Fed. (2) 944

STATUTES INVOLVED

Section 1652, Title 28, as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Section 47, Bankruptcy Act, Title 11, Section 75, provides:

> "§75. Trustees: duties
>
> (a) Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest; (2) deposit all money received by them in designated depositories; (3) account for and pay over to the estates under their control all interest received by them upon funds belonging to such estates; (4) disburse money only by check or draft on such depositories; (5) keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of; (6) set apart the bankrupts' exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; (7) examine the bankrupts (a) at the first meetings of creditors or at any other meetings specially fixed for that purpose, unless they shall already

have been fully examined by the referees, receivers, or creditors, and (b) upon the hearing of objections, if any, to their discharges, unless otherwise ordered by the court; (8) examine all proofs of claim and object to the allowance of such claims as may be improper; (9) oppose at the expense of the estates the discharges of bankrupts when they deem it advisable to do so; (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (11) pay dividends within ten days after they are declared by the referees; (12) report to the courts in writing the condition of the estates, the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; (13) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meeting of the creditors; and (14) lay before the final meetings of creditors detailed statements of the administration of the estates.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

(c) The trustee shall, within ten days after his qualification, record a certified copy of the order approving his bond in the office where conveyances of real estate are recorded in every county where the bankrupt owns real property or an interest therein, not exempt from execution, and pay the fee for such filing. He shall receive a

compensation of 50 cents for each copy so filed which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the expenses of administration. July 1, 1898, c. 541, §47, 30 Stat. 557; Feb. 5, 1903, c. 487, §10, 32 Stat. 799; June 25, 1910, c. 412, §8, 36 Stat. 840; June 22, 1938, c. 575, §1, 52 Stat. 860."

STATEMENT OF THE CASE

F. P. Newport, as President of the F. P. Newport Corporation, a large real estate corporation operating in Southern California through many years, was hit by the real estate depression in 1932. It was thrown into involuntary bankruptcy in 1935, H. F. Metcalf was appointed as Receiver by the Honorable Paul J. McCormick, the judge who handled the case through the many years. Later, Metcalf succeeded himself as trustee of the estate, when it consented to bankruptcy.

Because of its vast holding and impossibility of anyone to familiarize himself with the work and activities of the real estate involved and of its potentialities, 87.25% of the unsecured creditors signed a petition to the judge stating that since F. P. Newport was the one man really familiar with the operations of the business and could carry it on successfully, that he be employed. Judge McCormick then signed an order in which he said:

"It appearing to the Court that the assets of the said alleged bankrupt consists almost entirely of real property; that F. P. Newport, President of said alleged bankrupt corporation, has been en-

gaged in the real estate business in Los Angeles County, California, for the past twenty-five years, and that during the last fifteen years he has been engaged in the development of the property that constitutes the principal assets of said estate and that he is entirely familiar with the conditions surrounding said property and possible markets therefore:

That it was necessary for said receiver to have the services of F. P. Newport in order to sufficiently handle the operation of the aid estate

. . . . . .

And it further appearing the sum of $250.00 per month is a reasonable sum to be paid to said F. P. Newport for his services and good cause appearing therefore;"

Judge McCormick then ordered the employment of Mr. Newport at a salary of $250.00 per month,

"commencing with the 1st day of November, 1935 until the further order of this court.

Dated this 21st day of November, 1935.

/s/ Paul J. McCormick,
United States District Judge."

This order was never revoked.

Mr. Newport took up his duties under this Order per the agreement of 87.25 per cent of the unsecured creditors and the order of Judge McCormick. Later, in the proceedings involving the corporation, H. F. Metcalf, the Receiver, was qualified as trustee in bankruptcy of the estate and a Referee was designated in the case without any further consultation with Judge McCormick. Referee Utley made a second Order au-

thorizing the appointment of Mr. Newport at $250.00 per month "to continue so long as said F. P. Newport shall be employed by said trustee or until further Order of this court."

There never was any further order of the court terminating Newport's employment.

On November 26, 1943, Mr. Metcalf wrote Mr. Newport that he was short of funds and that he could consider his services terminated beginning December 1, 1943.

This writing, however, was not presented to Judge McCormick nor to Referee Utley, and was not ignored by Mr. Newport who continued working on and "employed" continuously from that date until the payment by the corporation of funds in excess of two million dollars to the Security First National Bank, the secured creditor, and the sale of assets in the sum of $407,000 in 1954 with unsecured creditors being owed only the sum of $187,000 at that time. In other words, Mr. Newport, through continuous efforts, enabled the liquidation of all of the indebtedness, secured and unsecured, 100 cents on the dollar, with surplus left over which is being sought and claimed by attorneys and in connection with administration expenses and possible interest payments.

To date the attorneys representing the estate have received $110,000; have had claims pending for $38,707 more, and will have additional claims resulting from the additional time and services being spent by it.

Mr. Newport testified that Mr. Metcalf became ill after his appointment and that he, Newport, was virtually the acting trustee; that he arranged the oil deals on the properties of the Newport Corporation; that he fought the proposal to foreclose the Newport properties by the Security Bank at a time when such foreclosure would only have brought in about $350,564.15 to the estate and caused a complete loss to the unsecured creditors; that he opposed the sale of the properties for $350,564.15 and as a result brought in an additional sum of $407,000 and that he has worked 8 hours a day, 6 days a week in behalf of the F. P. Newport Corporation for the last twenty years, including the years from 1943 until the sale of the assets. That these services were known to the trustee and accepted by the trustee, and that it accepted all of the benefits which were conferred upon the entire class of persons. The receivership of the Newport Corporation was converted into a trusteeship without any change of personality or change of judges or courts. Mr. H. F. Metcalf, who was Receiver, changed his title to Trustee, and continued on the duties as Trustee. Mr. Newport continued on his work as previously entered into and Judge Paul J. McCormick continued as the Judge in charge of the entire case. Mr. Utley was appointed a Referee in the case, and while he issued an Order continuing the employment of Mr. Newport in somewhat different language than that which Judge McCormick had made, it was a supplemental order and not one that either received the approval or disapproval of Judge McCormick, or altered the Order of Judge McCormick in any way, as to work or amount, except that it read:

"To continue so long as said F. P. Newport shall be employed by said Trustee, or until the further order of this Court."

At no time did either Judge McCormick or Referee Utley ever make an order cancelling Newport's employment. On November 26, 1943, Mr. Metcalf wrote a letter to Mr. Newport in which he said he had been studying available cash and that he did not know what to do about the possibility of payments of future salary. He said that "you may accept this as a dismissal of your services beginning December 1, 1943." Newport did not accept it as a dismissal, but continued on and the Trustee accepted his continued services.

The letter was not signed by Metcalf in his capacity as Trustee, but was a personal letter from the Metcalf Company and signed by Metcalf. No application was made to Judge McCormick to nullify his previous Order and no application was ever made to Referee Utley and, of course, there was no opportunity for a review without an order nullifying any previous orders that had been made. The Trustee and the Referee and the Court knowingly continued to accept Newport's services.

Mr. Newport continued to work from that time on until the sale of the assets in 1954. He testified that he had worked 8 hours a day for 6 days a week and that the corporation and the trustee, with full knowledge, accepted all of the benefits of all of his work and the Trustee not only conferred and co-operated with him, but, because of the illness of Mr. Metcalf a portion

of the time and his later paralysis and illness, it became necessary for Mr. Newport to do practically all of the work with his full knowledge, co-operation and consent. As the Court was frequently consulted it was also aware of Newport's activities.

As a result of Mr. Newport's efforts, the estate benefitted among other many things in the following respects: A foreclosure of the properties by the Security First National Bank on its secured loan and the wiping out of all other creditors was prevented through the opposition of Mr. Newport, and the company carried on to a point where that on January 31, 1955, it had a total income of $2,665,407.83. Out of this total income it paid to the Security First National Bank, in full with interest on its secured claim, the sum of $2,044,983.66. It paid taxes on property outside of trust in the sum of $42,384.66; it paid income tax to the Government of the United States in the sum of $59,258.38, and interest on income tax in the sum of $18,525.63. It paid that date bankruptcy fees and expenses in the sum of $197,247.35; it paid street improvement bonds in the sum of $52,155.57; it also paid trust deeds, claims and interest in the sum of $53,398.19 and other expenses, and after paying all of the expenses above listed it had on hand on January 31, 1955, cash in the sum of $73,537.27.

In 1954 the Trustee proposed to sell the assets of Newport company, on a bid of $350,000, for the same. Mr. Newport objected to this amount as being too low, and Judge McCormick sustained his position and re-

referred the matter back for further consideration and on a further bidding the remaining assets were ordered sold for $407,000.00. There was then remaining a total of unsecured claims of $187,000.00.

Although the attorneys for the estate drew down $1110,000 as attorneys' fees and had applications in for $47,000 additional fees and will have additional claims for additional fees, Mr. Newport has not received one cent since 1943.

Following the sale of the assets, the Referee ordered a 25 per cent dividend paid to the unsecured creditors. This dividend was paid. He subsequently ordered an additional dividend of 15 per cent paid, making a total of 40 per cent paid to date and he has made an order to pay 60 per cent additional dividend to the unsecured creditors, which would pay them in full.

Among the additional valuable services that Mr. Newport rendered was the arranging of oil leases on the Newport properties, and he was one of the signers of the lease in connection with these properties.

Following the sale of the assets of the F. P. Newport Corporation, Mr. Newport filed his petition for fees and compensation. These took on two categories: One of them the unpaid fees under the Orders of Judge McCormick; and second, the application for fees for services rendered to the bankrupt estate, which were accepted by the estate, and which were rendered for the benefit of the entire class of creditors, and which were rendered to the bankrupt estate.

We were of the opinion that Judge Paul J. McCormick, who had supervised the estate as the Presiding Judge for a period of many years and who could take judicial notice of many things within his own knowledge, would be the best one to interpret the Order which he himelf had made and which was never revoked and to take judicial notice of many of the things that were done during this period of years.

We made a motion before the United States Court of Appeals for the Ninth Circuit to designate Judge McCormick, who had retired, to hear and determine the petition for allowance of fees to Mr. Newport. Judge McCormick consented to be appointed and an Order was made by Judge Stephens designating Judge McCormick to hear case; however, the matter did not reach the District Court of Appeals during the period designated and when the record did reach the District Court it was noticed for immediate hearing and, in fact, in the consideration of the defective certificate of the Referee only four days took place before the matter came on for hearing and another District Judge proceeded forthwith to hear and deny Mr. Newport's claims and to affirm the Referee, denying any fees to Mr. Newport, with prejudice.

QUESTIONS PRESENTED BY THIS APPEAL

I.

Whether an Order rendered by a District Judge and the interpretation of his own order should be heard only by the jduge who made the order, if available, especially as here where the retired judge consented to hear the matter and interpret his own order, and

Should this Court in its supervisory jurisdiction over trials and proceedings remand the case to be heard by the Judge who made the order in question and whose order was nullified by another judge not familiar with his intent.

II.

Whether an order made by a District Court judge and never reversed by him continues on until it is revoked, and whether the sums due under that order are due and payable to Mr. Newport.

III.

Whether the principles of *Erie v. Tompkins,* 304 U. S. governing substantive law apply to bankruptcy proceedings so that the law of the State of California as set out in its Statutes and decisions is binding equally upon the bankruptcy court and is governed by *Erie v. Tompkins* and by Section 1652 of Title 28, Bankruptcy Act.

IV.

Whether the Trustee and the Corporation and the creditors of F. P. Newport Corporation, Ltd., having accepted the voluntary benefits of the services of F. P. Newport, which enabled more than two million dollars

to be paid off, and which will enable them to receive their claims in full are estopped to deny Newport's claim and are governed by the laws of the State of California, that he who accepts the benefits must bear the burden.

V.

Whether the Trustee is etopped to deny the compensation for the services and must pay the reasonable value of the services to Mr. Newport.

VI.

Whether the voluntary benefits accepted by the F. P. Newport estate are such that Newport should be compensated in equity for the preservation of and benefits to the entire fund under well known equitable principles.

VII.

Whether the Referee erred in refusing to receive evidence from Mr. F. P. Newport as to all of the services rendered and denying the many offers of proof made of all the services and the work performed by Mr. Newport.

VIII.

Whether the claims of Newport should have been heard by the District Court judge and not the referee.

Reasons for Granting the Writ:

(1) The Courts below have decided this case contrary to Title 28 Section 1652 U. S. Code and contrary to *Erie v. Tompkins*, 304 U. S. 64.

(2) The case raises important questions of Bankruptcy Law which require this court's plenary consideration and supervision.

(3) The Court below has decided this case contrary to equitable principles and justice.

ARGUMENT

I.

AN ORDER RENDERED BY A DISTRICT JUDGE AND THE INTERPRETATION OF HIS OWN ORDER SHOULD BE HEARD ONLY BY THE JUDGE WHO MADE THE ORDER, IF AVAILABLE. THIS COURT IN ITS SUPERVISING CAPACITY OVER APPEALS SHOULD THEREFORE REVERSE THE CAUSE. DEFENSE SUPPLY CORPORATION vs. LAWRENCE WAREHOUSE CO., 326 U. S. 631.

The Order of Judge McCormick was never set aside by Judge McCormick or any other District Court Judge, and Mr. F. P. Newport continued to render services from 1943 until the sale of the assets—all of which were received by the estate

The Order of the Court and the Contract of Employment were made by District Court Judge Paul J. McCormick and Mr. Newport had a right to rely on it,

and is entitled to the full compensation of $250.00 per month from 1943 to the date of the sale for these services, including the entry of the final judgment of sale. The word "until" as set out in the Order presupposes that *when the condition following such word* shall become operative, the precedent condition or status shall fail.

In re Wiegand, 27 Fed. Supp. 725, 729;
Faust v. Faust, 103 Cal. App. 2d 755.

As stated in *In re Wiegand,* the word means: "during the whole time before, up to the time of, (an action, occurrence, etc.), implying cessation or reversal at that time."

Therefore, until the District Court Judge issued a different order, Judge McCormick's order remained in full force and effect.

We know of no authority or power to terminate a judge's order, except by another order cancelling the same, or by an Act of Congress withdrawing jurisdiction from the court. Even where an Act of Congress ends, the judgment or order continues in effect. (See *Defense Supply Corporation v. Lawrence Warehouse Co.,* 326 U. S. 631, 93 L. Ed. 931.) None of these occurred in the instant case. The Trustee, if he desired to change Judge McCormick's Order, should have applied to Judge McCormick. There is no power granted under the Bankruptcy Act, either to the Trustee or the Referee, to change the Order of the District Judge; their powers are strictly statutory, and no power exists to change, alter, modify, or otherwise do anything with

the District Judge's order. He and he alone has that power.

Having failed to apply to the District Court for an Order terminating the former Order, the Respondent now seeks to smother it. The fact that the Receiver converted his position into a trusteeship did not change the order of the District Judge, and it did not make the District Judge's order "*functus officio*", as Respondent sought to urge. It was not the Order of Judge McCormick that became *functus officio*, but merely a conversion of the form of estate from Receivership into Trusteeship.

Nothing happened to change Judge McCormick's Order. The bankruptcy was in the same estate; it bore the same number; it dated back to the beginning of the proceeding; the same man handled the trusteeship, and Mr. Newport continued in the same duties under which the contract of employment was entered into by the District Court, and the District Court's judgment and order made employing him. Therefore, until it was set aside, Mr. Newport was entitled to his fees.

By the practice which prevails in the Federal Courts throughout the United States, a Motion to Dissolve an Order made by one judge should always be addressed to the judge who granted the order and no other judge should consent to review or change such order on the same state of facts.

Ide v. Crosby, 104 Fed. 582;
Westerly Water Works v. Town of Westerly, 77 Fed. 783, 785.

In *Klein v. Fleetford,* 35 Fed. 98, a motion granted by one District Judge was sought to be disolved by a Circuit Judge. Judge Brewer, in respect thereto, said:

> "I had occasion last term, in deciding a case, to say to counsel that as a rule injunctions issued by one judge would remain, unless modified, changed, or set aside by the same judge."

By parity of reasoning, it is respectfully urged that no other judge ought to have any say so of the order made by Judge Paul J. McCormick, except Judge McCormick, and that he ought to have had the case to be heard, or that his views regarding his order should have been secured.

There is nothing in the Bankruptcy Act, Section 47, Title 11, Sec. 75 that authorizes the Trustee to employ or terminate employment, or to review an order of the Referee. It is only the action of the Referee or the Judge that is subject to appeal.

Section 39 of the Bankruptcy Act, Title 11, Section 67, provides in section (c), as follows:

> "(c) A person aggrieved by an order of the referee may, within ten day after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforce-

ment of the order complained of may be suspended by the court upon such terms as will protect the right of all parties in interest."

The Trustee never submitted an order to the Referee or the Judge from which a review could be taken. Until this was done the orders continued in force.

II.

AN ORDER MADE BY A DISTRICT COURT JUDGE AND NEVER REVOKED CONTINUES ON UNDER ITS OWN TERMS UNTIL IT IS REVOKED. THE SUMS DUE UNDER JUDGE McCORMICK'S ORDER ARE DUE AND PAYABLE TO MR. NEWPORT.

In connection with the Order of Judge McCormick, 87.25% of the unsecured creditors had petitioned Judge McCormick to employ Mr. Newport. Not only was this an Order of Judge McCormick, but it was a contract entered into for their benefit and for the benefit of the entire estate.

In this respect, when the matter came on for hearing on Newport's Petition for Fees, no Notice was given to the unsecured creditors of the proposed hearing nor of any attempt to cancel the contract which had been made at their request and in their behalf, and to which dividends in their behalf had been made and received by them and through Mr. Newport's efforts have been made available to them. In this respect, equity will protect Mr. Newport for his efforts in their

behalf as he should properly be protected in this matter.

Central R. R. etc. Co. v. Pettus, 113 U. S. 116, 127, in which it is stated:

> "Without at all conceding that an express contract of that character would have added to the power of the court in the premises, it seems to us that the present case is embraced by the reason of the rule announced in *Trustees v. Greenough*. When the litigation was commenced, the unsecured bonds of the Montgomery and West Point Railroad Company were without any value in the financial market. That litigation resulted in their becoming worth all or nearly all that they called for. The creditors who were entitled to the benefit of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and vigilance of the appellee, so far as the result of litigation may, in any case, be referred to the labors of counsel. When creditors filed their claims they had notice, by the bill, that the suit was brought, not exclusively for the benefit of the complainants therein but equally for those of the same class who should come in and contribute to the expenses of the litigation. Those expense necessarily included reasonable counsel fees, which, upon every ground of justice, should be estimated with reference as well to the claims of the complainants who undertook to protect the rights of all the unsecured creditors, as of the claims of those who accepted the fruits of the labor of complainants and their solicitors. We are of the opinion that the appellees are entitled to reasonable compensation for their pro-

fessional services in establishing a lien, in behalf of the unsecured creditors of the Montgomery and West Point Railroad Company, upon the property described in the suit instituted by Branch, Sons & Co. and others; and that such compensation should be made with reference to the amount of all claims filed in the cause, although the evidence thereof may have been retained in the custody of the respective creditors; excepting from such estimate or calculation not only the claims of the complainants named in the bill, and of other unsecured creditors who may have had special contracts with appellees, or settled with them, but also such claims purchased by appellants as were not filed for allowance under the decree."

See also:

Trustees Internal Improvement Fund v. Greenough, 105 U. S. 527, 26 L. Ed. 1157;

Sprague v. Ticonic National Bank, 307 U. S. 161, 83 L. Ed. 1184.

III.

THE VOLUNTARY BENEFITS ACCEPTED BY THE F. P. NEWPORT ESTATE ARE SUCH THAT NEWPORT SHOULD BE COMPENSATED IN EQUITY FOR THE PRESERVATION AND BENEFITS TO THE ENTIRE FUND UNDER WELL KNOWN EQUITABLE PRINCIPLES.

Mr. Newport is entitled further to extraordinary fees for services rendered in preserving the whole estate.

In addition to the fee which Mr. Newport asked under the Order of Judge McCormick at the rate of $250.00 per month, Mr. Newport, by way of testimony and offer of proof, showed that he had rendered many other services in obtaining oil contracts and in improving and preserving the property, and in obtaining assets for the estate which had exceeded well over two million dollars. Had he not taken steps and conducted the activities which he did, *none of the unsecured creditors* (87.25 per cent of whom signed to have him employed) *would have received their compensation.* The Security-First National Bank, which was a secured creditor, would not have been paid in full, and the unsecured creditors would not have been in a position to receive the funds they are about to receive.

In *Vangel v. Vangel,* 45 A.C. No. 24, page 828, which involved the dissolution of a partnership, one of the partners quarreled with the other partners and was expelled from the partnership for cause, and by judi-

cial decree, and after he had been expelled he continued to participate with his former partners in the operation and management of the business. He contended that he was entitled to receive compensation for services so performed. In reply, his brothers stated that his services were "after dissolution" and were voluntary and against their wishes. However, the Supreme Court of California held that they acquiesced fully in continuing his services and that he was therefore entitled to compensation—so here too. In this case the Supreme Court of California said:

> "The balance of the equities favors the allowance of compensation based upon services rendered." (45 A.C. 834).

The Supreme Court of California further said:

> "The type of operation here shown is one which involves a considerable amount of service and skill in the cultivation and harvesting of a citrus crop. Furthermore, it would be inequitable to deny Charles compensation for his services where his brothers acquiesced in them." (45 A.C. 834).

We are in a much stronger position as far as Mr. Newport is concerned. The operations of the Newport Corporation required the services and skill in the work that was done and it is a fact, which was known to Judge McCormick and to the Referee and others, that Mr. Metcalf was ill a substantial portion of his trusteeship. The work that was done by Mr. Newport required skill (as shown by the petition for his employment) and that he rendered that skill and service is shown by the

results achieved—more than two and a half million dollars realized from an estate that was totally bankrupt and would have been foreclosed for a sum in the neighborhood of $350,000 except for the intervention of Mr. Newport.

It would be inequitable to deny him compensation, just as in the *Vangel* case.

In the *Vangel* case, there was no order of a judge; but in the instant case Judge McCormick and 87.25% of the unsecured creditors fully authorized Mr. Newport's employment and authorized the compensation for him. Neither the judge nor the creditors benefitting from it revoked their order or agreement, and it would be inequitable to deny him compensation, both under the orders of Judge McCormick and under equitable principles, where the estate had received the full benefits of all of Mr. Newport's work, which they accepted to 1954.

In *Dodd v. Stellar*, 30 Cal. 2d 506, and particularly at pages 509 and 510, various cases are cited which set forth that:

> "It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them."

See: *Winslow v. Harold G. Ferguson Corp.*, 25 Cal. 2d 274, 277; 153 P. 2d 714; 14 Am. Jur. §74; *Trustees of Int. Imp. Fund v. Greenough*, 105 U. S. 527; *Estate of Marre*, 18 Cal. 2d 191; *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161; *Scott v. Superior Court*, 208 Cal. 303; *Central Railroad & Banking Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915; *Colley v. Wolcott*, 187 F. 595; *Muskegon Boiler Workers v. Tennessee Valley I. & R. Co.*, 274 F. 836.

See, also: *Hardware Mut. Casualty Co. v. Butler*, 116 Mont. 73, 148 P. 2d 563; *Ellis v. Atlantic Refining Co.*, 308 Pa. 287; 163 A. 531, 83 A.L.R. 936; *Appeal of Harris*, 323 Pa. 124, 186 A. 92, 96; *Wilson v. Pittsburgh B. & I.*, 85 Pa. Super. 537.

And see *R. E. Spriggs Inc. v. Industrial Accident Commission*, 42 Cal. 2d 785, particularly page 793, reviewing other California cases and affirming the principle we have enunciated.

The Supreme Court of California has said, in the *Spriggs* case, quoting from *Estate of Marre*, 18 Cal. 2d 191:

> "Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but there is created in favor of the attorney who renders the service an equitable lien against the funds so preserved." (citing cases). (42 Cal. 2d 794).

In *Vaught v. Charleston National Bank*, 62 Fed. 2d 817, at 820, the court said:

"But these salutary and settled principles do not prescribe the employment of an officer for tasks other than those imposed upon him by his office. The rule is accordingly well settled that where an officer of a corporation, at the request or with the acquiecence of other authorized officers, renders services clearly outside of his ordinary official duties, under circumstances which raise a presumption that the parties should have understood that they were to be paid for, he may recover reasonable compensation therefor. *Fitzgerald Const. Co. v. Fitzgerald,* 137 U. S. 98, 111., 11 S. Ct. 36, 34 L. Ed. 608; *Corrine Mill, Canal & Stock Co. v. Toponce,* 152 U. S. 405, 14 S. Ct. 632, 38 L. Ed. 493; *National Loan & Investment Co. v. Rockland Co.* (C.C.A. 8) 94 F. 335; *Montana Tonopah Mining Co. v. Dunlap* (C.C.A. 9) 292 F. 19, 23; *Tietsort v. Irwin* (C.C.A. 6), 9 F. (2d) 65; *Church v. Harnit* (C.C.A. 6) 35 F. 2d 499, certiorari denied 281 U. S. 732, 50 S. Ct. 247, 74 L. Ed. 1148; *Crown Central Petroleum Corp. v. Bates* (C.C.A. 5) 37 F. (2d) 508, certiorari denied 281 U. S. 743, 50 S. Ct. 348, 74 L. Ed. 1156; *Pew v. First Nat. Bank,* 130 Mass. 391, 395; Wilgus, *Cases on Private Corporations,* p. 1757; *Thompson on Corporations,* (2d Ed.) ch. 66, §§1825-1829; Subject note, L.R.A. 1917 F. 319. In the *Fitzgerald* case, *supra,* it was held that it was outside of the official duties proper of the treasurer of a private corporation to go to expense and trouble to procure finances for the company."

And, particularly, see *Fitzgerald Construction Co. v. Fitzgerald,* 137 U. S. 98, 34 L. Ed. 608.

Mr. Newport is entitled to all of the monies unpaid under the order of Judge McCormick and to all the unpaid extraordinary fees. The attorneys for the estate have, to date, been paid almost $200,000.00. All of these funds were preserved for the estate and attorneys and creditors by Mr. Newport. His claim should be allowed in full.

In *Corrine Mill, Canal & Stock Co. v. Toponce,* 152 U. S. 495, 38 L. Ed. 493, at 498, the Supreme Court of the United States held that a general manager of a corporation may recover for his services where they were rendered under such circumtances as raises an implied promise to pay for them on the part of the corporation.

The Trustee accepted the services of F. P. Newport over a period of years and there should be reimbursement.

Re Lustron Corporation, 196 Fed. 2d 975;
Chapin v. Collard, 189 P. 2d 642;
Sprague v. Tyconic National Bank, 307 U. S. 161.

Erie v. Tompkins, applying the law of the State of California, is equally applicable in bankruptcy proceedings. Under that situation, Section 1589 of the Civil Code of California provides as follows:

"§1589. Acceptance of Benefits Assumes Burdens.—A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

This section was binding; also Section 3521 of the Code of Civil Procedure reading:

> "He who takes the benefit must bear the burden."

The burden is the salary of Mr. Newport, plus fees for extraordinary service. His services brought funds to the entire estate. The attorneys' fees depleted it. It would be inequitable to deny him compensation for these benefits which they accepted.

IV.

THE REFEREE ERRED IN REFUSING TO RECEIVE EVIDENCE FROM MR. NEWPORT AND DENYING THE OFFERS OF PROOF MADE OF ALL OF THE SERVICES AND WORK PERFORMED BY MR. NEWPORT.

At the time of the hearing before the Referee, the attorney for the Trustee, after a few minutes of hearing, made a motion to dismiss the petition and objected to the introduction of evidence. The objection was sustained and thereafter all of the testimony, letters, documents and exhibits were introduced by way of offer of proof. The Referee's decision was therefore not based upon petitioner's evidence—nearly all of which he rejected. None of it was rebutted or contradicted.

It was therefore highly prejudicial error to reject this evidence and base a decision of dismissal without its consideration. The attitude of the Referee can be seen in his attempt to pick on the fact that the petition

for review was filed in the District Court Clerk's office (authorized by Bankruptcy Rule, General Order 20) rather than with him as grounds for dismissing the petition as not timely—any straw in the wind.

Since this is an equity case, this Court has as much right under the Bankruptcy Act (Sec. 24) to hear and determine the law and facts as the District Court. We therefore ask this Court to consider all the evidence offered as *offer of proof*. We are willing to have a reference to take the testimony of Judge McCormick to interpret his own order.

The Circuit Court of Appeals erroneously construed *Imperial Assurance Company v. Livingston*, (8th Cir.), 49 Fed. 2d 745; 74 A.L.R. 1336. This case holds that everything that is done by a Trustee must be approved by the Court, and that the Trustee should frequently refer matters to the Court for its determination and approval. This case helps, rather than hurts us.

In the Newport matters, the Trustee never did seek the approval of the court to terminate Newport's employment. Having failed to do so, he now seeks to have the court do what should have been done, had he desired to terminate the court's order and the employment of Newport on behalf of the creditors who had petitioned the court. His letter to Newport was not even signed as "Trustee", it was an individual matter resulting from a then shortage of funds. Newport had a right to rely on the orders of the Judge and the continued acceptance of his services by the Trustee and the Corporation which needed them badly. Had there been

a Judge's or Referee's order terminating his employment, he could have sought a review; but since the action was unofficial, and not approved by the judge, the employment necessarily continued and he had a right to rely on it.

The principle of "estoppel" is an equitable principle that prevails. A big estate benefitted, and the creditors all benefitted. Estoppel may exist even against a public body when they cause one to change his position to his detriment. (*Los Angeles Times Mirror Co. v. Superior Court,* 3 Cal. 2d 309). If the law of the State of California applies through *Erie R. Company v. Tompkins,* 304 U. S. 64, the Trustee is estoppel, and the estate, which benefited, is estopped.

The Court of Appeals concedes that Newport's actions involve no fraud. Therefore, the legal principles set forth in *Freeman Coal Mining Co. v. Burton,* 388 Ill. 604, 58 N.E. (2d) 589, certiorari denied, 325 U. S. 859, could have no application, as that case was based entirely on fraud.

Here Newport's conduct was extremely beneficial to the corporation to the extent of paying off more than $2,000,000 in secured indebtedness (in full with interest) and having sold the balance of its assets for $407,000.00, with unsecured claims amounting to $187,000.00.

We submit that the Court of Appeals has decided this case contrary to fundamental principles and this case involves important questions of Bankruptcy Law

that require the plenary consideration of this Honorable Court and a reversal of the holding of the court below that the principles of *Erie R. Co. v. Tompkins,* 304 U. S. 64, and Title 28 Section 1652 do not apply in bankruptcy.

We respectfully pray for reversal of the judgment below—for an order to pay Mr. Newport the unpaid salary from 1943 and for the payment of extraordinary fees to Mr. Newport for services rendered in preserving the common fund and enhancing it to more than $2,500,000, and a sale of the balance of the assets for $407,000.00.

Repectfully submitted,

MORRIS LAVINE
Attorney for Appellant.

APPENDIX

OPINION

F. P. NEWPORT, Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of F. W. Newport Corporation, Ltd., et al., Bankrupt, Appellee.

No. 15044.

United States Court of Appeals

Ninth Circuit.

June 5, 1956.

Rehearing Denied July 6, 1956.

233 Fed. (2) 944

CHAMBERS, Circuit Judge.

We have here a question of compensation for services (and some expenses) in the matter of the estate of the F. P. Newport Corporation, Ltd., which has been in bankruptcy for over twenty years.

Before the adjudication of bankruptcy and until the appointment of a trustee, H. F. Metcalf was the receiver in bankruptcy. After a contest, Metcalf succeeded himself and became the trustee. The appointment for the latter office bears date of March 18, 1937. Eventually, Metcalf was succeeded as trustee in 1951 by Sampsell, appellee herein.

F. P. Newport, who in more prosperous days controlled the corporation bearing his name, apparently has been active in connection with the administration of the bankrupt estate since the inception of the bankruptcy proceedings. The activity seemingly has continued to a very recent date.

In November 1935, during the existence of the receivership, the district judge supervising the proceedings entered an order, the operative part of which reads as follows:

> "It is hereby ordered that H. F. Metcalf, Receiver, herein, be and he is hereby authorized to employ F. P. Newport to assist him in the handling of the properties of said estate and said Receiver is hereby authorized and directed to pay said F. P. Newport a salary of $250.00 per month commencing with the 1st day of November, 1935, until further order of this Court."

We shall allude later herein to the above as order No. 1.

On May 17, 1937, Metcalf, in his new capacity as Trustee, obtained an order (hereafter order No. 2) from the referee in bankruptcy in charge of the Newport Corporation's bankruptcy reading as follows:

> "It is hereby ordered: That said Trustee be and he is hereby authorized to employ F. P. Newport as an assistant in the management and operation of the properties of the above named bankrupt and to pay to said F. P. Newport for such services the sum of $250.00 per month, said salary to be

paid out of the assets of said estate and to be charged as expense of administration of said bankrupt estate; said salary to be payable as of February 23, 1937, and to continue so long as said F. P. Newport shall be employed by said Trustee or until the further Order of this Court."

On November 26, 1943, Metcalf, as trustee, in writing notified Newport that the latter's services were terminated as of December 1, 1943. Newport was fully paid from the time of his employment in 1935 to November 30, 1943, by Metcalf in his successive official capacities.

Now Newport asserts claims for ordinary services from December, 1943, to May 3, 1954, and for extraordinary services to the trustee. The total claim is for some $127,000 for services and some $34,400 for expenses.

The claim was denied by the referee after a hearing. Upon review, the district court affirmed the referee. The matter now comes to us on appeal.

Petitioner's claim is partially projected from the fact that order No. 1, provides that the salary of $250.00 is authorized and ordered to be paid "until further order of this court." Then the argument is buttressed with the circumstance that the same man, Metcalf, became trustee, succeeding himself as receiver.

[1] In our judgment, the case must be considered as if Metcalf were succeeded as receiver by someone else as trustee. The point is the office is the important thing, not who held it.

[2] In our view, order No. 1 has its own built-in limitation. Absent some amendment, it must be taken to preclude employment of Newport beyond the receiver's term as receiver. It says "H. F. Metcalf, Receiver, is authorized to employ F. P. Newport" and "the Receiver is authorized and directed to pay." The order doesn't authorize anyone else but the receiver (whose duties were completed in 1937) to pay. We think it clear that when the office of receiver terminated Newport's employment *ipso facto* terminated.

[3] When order No. 2 was entered authorizing Metcalf as trustee to employ Newport, the order authorized the trustee to discharge Newport. Of course, Newport must be charged with knowledge of the order. When Metcalf discharged Newport, that was it. The terms of the employment of Newport were regulated by the order. When the authorization expired by its own terms, continued employment was precluded thereby.

[4] We hold that one who is employed pursuant to a court order, the terms of which fix the length of service and which authorize the trustee to discharge, cannot get back on the trustee's payroll, performing essentially the same services, without further court order. That is to say, a condition is implied that upon discharge the person is not to be rehired without further order of court.

[5] The referee may have intended to find as a matter of fact that F. P. Newport's continued attention to the affairs of the bankrupt was that of a volunteer.

However, the express finding on the point seems more in the nature of a conclusion of law. If Newport was not as a matter of fact a volunteer, (if fact finding were in our purview, we would hold him a volunteer) we think he must be held to be a volunteer as a matter of law.

[6, 7] Newport relies heavily on estoppel. He says the trustee misled him. He acted in reliance thereon to his detriment. Through *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, he would import the California law of estoppel. But the difficulty is that the trustee draws his power from the roots of the Bankruptcy Act. His powers are limited. 11 U.S. C.A. §75. It is not for him to estop an estate, and thereby creditors, out of a substantial part of its assets. It is well settled bankruptcy law that on important decisions, whatever their character, the trustee must get the court's approval (or that of its delegate, the referee). This necessity is exemplified here by the fact that first the receiver and then the trustee did get court authority to hire F. P. Newport. Those orders have long ago spent themselves. While Newport's relation to the trust involved no fraud, yet the legal principles set forth in *Freeman Coal Mining Corporation v. Burton,* 388 Ill. 604, 58 N.E. 2d 589, certiorari denied 325 U. S. 859, 65 S. Ct. 1196, 89 L. Ed. 1978, are very much in point. See also *Imperial Assurance Co. v. Livingston,* 8 Cir. 49 F. 2d 745, 74 A.L.R. 1336.

The order of the district court sustaining the referee's disallowance of F. P. Newport's claims is affirmed.

SUBJECT INDEX

PAGE

Reasons for denying the writ 2

Official and unofficial reports of the opinions delivered in the courts below not referred to in the petition (Supreme Court Rule 40 1 (a)) 4

Jurisdiction 4

Questions presented for review 5

List of documents 6

Statement of the case 8

Argument 17

Petitioner's brief including 37

(a) Statement of the case 37

(b) Questions 41

(c) Argument 42

Conclusion 45

SUBJECT INDEX

	PAGE
Reasons for denying the writ	2
Official and unofficial reports of the opinions delivered in the courts below not referred to in the petition (Supreme Court Rule 40 1 (a))	4
Jurisdiction	4
Questions presented for review	5
List of documents	6
Statement of the case	8
Argument	17
Petitioner's brief including	37
(a) Statement of the case	37
(b) Questions	41
(c) Argument	42
Conclusion	45

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Beecher v. Leavenworth State Bank, 184 F. 2d 498	23
City of Glendale v. Coquat, 52 P. 2d 1178, 102 A. L. R. 837	33
Cox v. Elliott, 122 F. 2d 851	25
Deitrick v. Greaney, 309 U. S. 190	34
Eureka Upholstering Co., In re, 48 F. 2d 95	24
Goldie v. Cox, 130 F. 2d 690	24
Halstead v. Grinnan, 152 U. S. 412, 38 L. Ed. 495	31
Imperial Assurance Co. v. Livingston, 49 F. 2d 745, 74 A. L. R. 1336	42, 43
Joslyn, In re, 224 F. 2d 223	25, 27
Lane Lumber Co., In re, 206 Fed. 780	25
Loose, In re, 52 Fed. Supp. 20	23
Los Angeles Times-Mirror v. Superior Court, 3 Cal. 2d 309	42, 43
Lustron Corporation, In re, 196 F. 2d 975	42, 43
F. P. Newport Corp., In re, 123 Fed. Supp. 95	35
F. P. Newport Corp., In re, 137 Fed. Supp. 58	11, 19
Newport v. Sampsell, 216 F. 2d 344	35, 37
Newport v. Sampsell, 233 F. 2d 944	12, 36
New York Investors, In re, 49 Fed. Supp. 900	27
Owl Drug Co., In re, 16 Fed. Supp. 139	25, 27
Pedisich, In re, 103 Fed. Supp. 199	24
Stanolind O. & G. Co. v. Logan, 92 F. 2d 28	35
Stanton v. Busch, 59 F. 2d 668	18, 19
Thomasson v. Walker, 190 S. E. 309, 110 A. L. R. 593	33
United States v. Metcalf, 51 A. B. R. (N. S.) 727, 131 F. 2d 677	10
Whittla v. Nelson, 213 Fed. 587	27

RULES

Rules of the United States Supreme Court:

Rule 19 1 (b)	2, 45
Rule 23 1 (a) (b) (iii), (c) (d) (e) (g) (h) (i) 4	3
Rule 24 1	2
Rule 40, 1 (a) (b) (c) (d) (1) (2) (e) (f) (g) (h) 2, 3, 4	4

STATUTES

PAGE

Bankrupty Act, Sec. 1, Subsecs. 3, 10 ..... 4, 42
Bankruptcy Act, Sec. 2 4
Bankruptcy Act, Sec. 2 (a) (3) (18) 17, 18
Bankruptcy Act, Sec. 7 14
Bankruptcy Act, Sec. 22 (a), (b) 42
Bankruptcy Act, Sec. 24 (a) (b) 4
Bankruptcy Act, Sec. 38 4
Bankruptcy Act, Sec. 47 14
Bankruptcy Act, Sec. 47 (a) 26
Bankruptcy Act, Sec. 48c (2) 10
Bankruptcy Act, Sec. 64a (1) 43
General Order in Bankruptcy 36 4
General Order in Bankruptcy 37 4
General Order in Bankruptcy 44 23
General Order in Bankruptcy 45 23
United States Code Annotated, Title 11, Chap. 1, Sec. 1 ..... 4, 42
United States Code Annotated, Title 11, Chap. 2, Sec. 11 .. 4, 17, 18
United States Code Annotated, Title 11, Chap. 3, Sec. 25 14
United States Code Annotated, Title 11, Chap. 4, Sec. 45 42
United States Code Annotated, Title 11, Chap. 4, Sec. 47 4
United States Code Annotated, Title 11, Chap. 5, Sec. 66 4
United States Code Annotated, Title 11, Chap. 5, Sec. 75 ..... 14, 26
United States Code Annotated, Title 11, Chap. 5, Sec. 76 10
United States Code Annotated, Title 11, Chap. 7, Sec. 104 43

TEXTBOOKS

6 American Jurisprudence, Sec. 356, p. 760 18
14 American Jurisprudence, Sec. 74 42
19 American Jurisprudence, Sec. 42, p. 640 29
19 American Jurisprudence, Sec. 50, p. 650 30
19 American Jurisprudence, Sec. 55, p. 661 30
19 American Jurisprudence, Sec. 490, p. 339 30
Collier's Bankruptcy Manual (2d Ed.), Sec. 62, p. 706 ..... 26, 41
1 Remington on Bankruptcy (5th Ed.), Sec. 350, p. 507 19
Restatement of Law of Restitution, Sec. 148, p. 589 31
Restatement of Law of Restitution, Subsec. 1, Subd. d, p. 592 .. 31

INDEX TO APPENDIX

PAGE

Findings of fact, conclusions of law, and order dismissing claims of F. P. Newport for fees 1

Certificate of referee on reviews of his order dismissing the petition of F. P. Newport for fees 7

Memorandum opinion on review 15

Decision on review 23

Order affirming order of referee dismissing with prejudice petition of F. P. Newport for allowance of compensation for alleged services 24

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

F. P. NEWPORT,

Petitioner,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., *et al.*,

Respondents.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., presents his brief in opposition to the petition of F. P. Newport for a writ of certiorari herein, and in support of an order denying said writ.

Reasons for Denying the Writ.

Pursuant to the provisions of Supreme Court Rule 24, Respondent hereby designates the following matters and grounds why the cause should not be reviewed by the Supreme Court of the United States:

1. The United States Court of Appeals, Ninth Circuit, has not rendered a decision in conflict with the decision of another court of appeals in the same matter. (See S. Ct. Rule 19, 1(b).)
2. The United States Court of Appeals, Ninth Circuit, has not decided an important state or territorial question in a way in conflict with applicable state or territorial law. (See S. Ct. Rule 19, 1(b).)
3. The United States Court of Appeals, Ninth Circuit, has not decided an important question of federal law, which has not been, but should be, settled by the Supreme Court of the United States. (See S. Ct. Rule 19, 1(b).)
4. The United States Court of Appeals, Ninth Circuit, has not decided a federal question in a way in conflict with the applicable decisions of the Supreme Court of the United States. (See S. Ct. Rule 19, 1(b).)
5. The United States Court of Appeals, Ninth Circuit, has not so far departed from the accepted and usual course of judicial proceedings, nor so far sanctioned such departure by a lower court, as to call for an exercise of the power of supervision vested in the Supreme Court of the United States. (See S. Ct. Rule 19, 1(b).)

6. Petitioner has failed to present with accuracy, brevity and clearness facts essential to a ready and adequate understanding of the points which petitioner claims require the consideration of the Supreme Court of the United States. (See S. Ct. Rule 23, par. 4.)

7. That many of the purported facts stated in the petition for writ of certiorari herein are inaccurate and misleading, and do not serve to give to the Supreme Court of the United States "whatever is essential to a ready and adequate understanding of the points which petitioner claims require consideration by this court." (See S. Ct. Rule 23, par. 4.)

8. The petition for writ of certiorari does not (as required by S. Ct. Rule 23, par. (i)) have appended thereto (1) the referee's findings of fact, conclusions of law and order filed November 15, 1955, dismissing with prejudice the claim of F. P. Newport for fees [R. p. 63], (2) the referee's certificate on review dated December 6, 1955 [R. p. 72], (3) the Memorandum Opinion of the Honorable Leon R. Yankwich, Chief Judge of the District Court, on review, dated December 23, 1955 [R. p. 83], (4) the decision of the Honorable Leon R. Yankwich on review dated December 23, 1955 [R. p. 94], and (5) the order of Chief Judge Yankwich affirming the order of the referee dismissing with prejudice the petition of F. P. Newport for compensation for alleged services, dated December 27, 1955. [R. p. 95.]

Official and Unofficial Reports of the Opinions Delivered in the Courts Below Not Referred to in the Petition. (S. Ct. Rule 40, 1(a).)

Referee's Findings of Fact, Conclusions of Law and Order filed November 15, 1955, dismissing with prejudice the claim of F. P. Newport for fees. [R. p. 63.]

The Referee's certificate on review dated December 6, 1955. [R. p. 72.]

The Memorandum Opinion of the Honorable Leon R. Yankwich, Chief Judge of the District Court, on review, dated December 23, 1955. [R. p. 83.] (137 Fed. Supp. 58.)

The decision of the Honorable Leon R. Yankwich on review dated December 23, 1955. [R. p. 94.]

The order of Chief Judge Yankwich affirming the order of the Referee dismissing with prejudice the petition of F. P. Newport for compensation for alleged services, dated December 27, 1955. [R. p. 95.]

For the convenience of the Court the omitted documents listed above are printed in the appendix attached hereto.

Jurisdiction.

Jurisdiction is conferred by 11 U. S. C. A., Section 1, subsections 3 and 10 (Bankruptcy Act, Sec. 1, subsecs. 3 and 10); 11 U. S. C. A., Section 11 (Bankruptcy Act, Sec. 2); 11 U. S. C. A., Section 47 (Bankruptcy Act, Sec. 24, subsecs. a, b and c); 11 U. S. C. A., Section 66 (Bankruptcy Act, Sec. 38); General Orders in Bankruptcy Nos. 36 and 37.

Questions Presented for Review.

1. Did the order of Judge McCormick dated November 21, 1935, authorizing the Receiver to employ Mr. Newport, become *functus officio* upon appointment and qualification of the Trustee on March 19, 1937?

2. Was F. P. Newport entitled to any compensation in excess of $250 per month for "extraordinary" services claimed to have been performed by him between November 1, 1935, when he was first employed, and November 30, 1943, the date of his discharge?

3. Was F. P. Newport entitled to any compensation from the bankrupt estate for services claimed to have been performed subsequent to his discharge by the Trustee on November 30, 1943?

4. Were the "extraordinary" services claimed to have been performed by F. P. Newport voluntary, duplicate services which the Bankruptcy Act requires the Trustee to perform? Was he entitled to compensation for any such services from the bankrupt estate?

5. Is F. P. Newport estopped by his laches from asserting any claim for compensation and expenses from the bankrupt estate?

6. Is the Trustee in Bankruptcy estopped to deny the claim of F. P. Newport for compensation?

List of Documents.

The following is a list of documents contained in the record on file in the Supreme Court, together with the notations of the pages of the record where said documents may be found. Reference will be made in Respondent's Brief to these documents. This list is prepared for the convenience of the Court.

	Record File Page
Order of Judge Paul J. McCormick appointing H. F. Metcalf Receiver, dated March 25, 1935	2
Petition of Receiver Metcalf for order authorizing employment of Newport and fixing his salary [Newport's Ex. 1; Rep. Tr. p. 10, lines 7 and 8]	6
Order of Judge McCormick authorizing Receiver to employ Newport and fixing his salary, dated November 21, 1935 [Newport's Ex. 2; Rep. Tr. p. 10, lines 7 and 8]	13
Adjudication and order to file schedules, dated January 12, 1937	16
Order appointing H. F. Metcalf Trustee and fixing his bond, dated March 18, 1937	17
Order of Referee Utley approving bond of H. F. Metcalf as Trustee, dated March 19, 1937	26
Petition of H. F. Metcalf, Trustee, for order authorizing Trustee to employ F. P. Newport and fixing his salary, dated May 17, 1937 [Newport's Ex. 3; Rep. Tr. p. 13, line 26, to p. 14, line 3]	20
Order of Referee Utley authorizing Trustee to employ F. P. Newport and fixing his salary, dated May 17, 1937 [Newport's Ex. 4; Rep. Tr. p. 13, line 26, to p. 14, line 3]	27

Copy of letter of H. F. Metcalf, Trustee, to Mr. Newport, dated November 26, 1943, terminating Mr. Newport's services "beginning December 1, 1943" [Trustee's Ex. A; Rep. Tr. p. 31, lines 7-25; p. 34, line 7, to p. 44, line 9] 43

Said Exhibit A reads as follows:

"November 26, 1943

"Mr. F. P. Newport
Central Bldg.,
Los Angeles, California

"Dear Mr. Newport:

The writer has been studying our memoranda of available cash in the various accounts.

I have been discussing this also with Mr. Lynch and I do not know what to do regarding possibility of payment of future salary to you. You may therefore, accept this as a dismissal of your services beginning December 1, 1943.

Should you care to bring this up for review, it will be quite all right with the writer whatever disposition the Court sees fit to make of it.

Very sincerely yours,
H. F. METCALF Co.,
H. F. Metcalf."

HFM ahh

Claim of F. P. Newport for fees and expenses, dated July 21, 1955 29

Trustee's objections to claim of F. P. Newport for fees and expenses 43

Objections of Wm. H. Neblett to Petition of F. P. Newport for fees and expenses 59A

Objections of Bank of America National Trust and Savings Bank to claim of F. P. Newport for fees and expenses 59J

Referee's Findings of Fact, Conclusions of Law and Order dismissing with prejudice claim of

F. P. Newport for fees, dated November 15, 1955 63

Objections of F. P. Newport to Findings of Fact, Conclusions of Law and Order dismissing his claim, dated November 15, 1955 60

Petition of F. P. Newport for review of Referee's Findings of Fact, Conclusions of Law and Order and Judgment, dated November 15, 1955 68

Petition of Morris Lavine for Review of Referee's Findings of Fact, Conclusions of Law, Order and Judgment, dated November 15, 1955 70

Referee's Certificate on Review, dated December 6, 1955 72

Referee's Supplemental Certificate on Review, dated December 14, 1955 80

Memorandum Opinion of Judge Leon R. Yankwich on Review, dated December 23, 1955 83

Decision on Review by Judge Leon R. Yankwich, dated December 23, 1955 94

Order affirming Order of Referee dismissing, with prejudice, petition of F. P. Newport for compensation for alleged services, dated December 27, 1955 95

Reporter's Transcript of hearing on September 19, 1955, before the Honorable Reuben G. Hunt, Referee in Bankruptcy, consisting of 119 pages not paged

Statement of the Case.

An involuntary petition in bankruptcy was filed against F. P. Newport Corporation, Ltd., a corporation, on March 19, 1935. On March 25, 1935, the Honorable Paul J. McCormick made an Order appointing H. F. Metcalf Receiver in Bankruptcy of the Estate. [R. p. 2.] The

assets of the corporation consisted almost exclusively of real property, most of it located in Los Angeles County.

F. P. Newport and his wife owned approximately 90% of the corporation's shares, and he had always dominated its policies. At the time the petition in bankruptcy was filed the corporation owed Security-First National Bank of Los Angeles over $1,351,000, secured by a deed of trust on most of its real property. There was also owing to Bank of America $50,000, secured by a trust deed, and there were unsecured claims of over $160,000. All the indebtedness was in default.

On November 21, 1935, the Receiver filed a petition for authority to employ Newport to assist him in his work [Newport's Ex. 1; Rep. Tr. p. 10, lines 7-8; R. p. 6]; and on that date Judge McCormick signed and filed an order authorizing the Receiver to employ Newport "to assist him in the handling of the properties of said estate" and directing the Receiver to pay Newport "a salary of $250 per month commencing with the 1st day of November, 1935, until the further order of this Court." [Newport's Ex. 2; Rep. Tr. p. 10, lines 7-8; R. p. 13.]

On January 12, 1937, F. P. Newport Corporation, Ltd., was adjudicated a bankrupt [R. p. 16] and the administration of the estate was referred to Ernest R. Utley, Referee. On March 18, 1937, Judge McCormick made an Order [R. p. 17] appointing H. F. Metcalf Trustee in Bankruptcy of the estate of F. P. Newport Corporation, Ltd., Bankrupt, and fixing his bond at $10,000. On March 19, 1937, Ernest R. Utley, Referee, to whom the case was referred, signed and filed an Order approving Metcalf's bond as Trustee. [R. p. 26.]

On May 17, 1937, H. F. Metcalf as Trustee in Bankruptcy filed a petition for an order [Newport's Ex. 3;

Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 20] authorizing him as Trustee to employ F. P. Newport and fixing his salary. On May 17, 1937, Referee Utley signed and filed an Order [Newport's Ex. 4; Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 27] authorizing the Trustee to employ Newport at a salary of $250 per month "to continue so long as said F. P. Newport shall be employed by said Trustee or until the further Order of this Court."

On November 26, 1943, H. F. Metcalf wrote a letter to Mr. Newport notifying him that he was dismissed "beginning December 1, 1943." [Trustee's Ex. A; Rep. Tr. p. 31, lines 7-25; p. 34, line 7, to p. 44, line 9.] See also copy of letter in List of Documents and in the Trustee's Objections to Newport's claim. [Rep. Tr. p. 3, line 23; p. 4, line 8; R. p. 43.] Mr. Newport received his salary from November 1, 1935, through November 30, 1943. [Findings of Fact, par. 12, p. 4, lines 25-27; R. p. 63.] Since then he has received no salary. He made no demand for compensation from December 1, 1943, until he filed the petition involved in this litigation on July 21, 1955. [Rep. Tr. p. 38, line 14, to p. 39, line 12; R. p. 29.]

Mr. Metcalf had a stroke in October, 1950, and an Order was made on November 2, 1950, removing him as Trustee. He died on May 23, 1951. It is significant that Mr. Newport did not assert a claim for over four years after Mr. Metcalf's death.

On November 23, 1942, in the case of *United States v. Metcalf* ((C. C. A. 9) 51 A. B. R. (N. S.) 727, 131 F. 2d 677) this Court decided that, because of certain activities of the Trustee, he was *operating* the business of the bankrupt. Consequently the Trustees, respectively, received double compensation as provided in Bankruptcy Act, Section 48c(2) (11 U. S. C. A., Sec. 76) until the filing of an Order in Liquidation on May 26, 1952.

Written objections to Mr. Newport's petition were filed by the Trustee [R. p. 43] by Bank of America National Trust and Savings Association [R. p. 59J] and by Wm. H. Neblett. [R. p. 59A.] The petition and the objections were heard before Referee Reuben G. Hunt on September 15, 1955. After Newport's Exhibits 1, 2, 3 and 4 and the Trustee's Exhibit A were introduced, counsel for the Trustee objected to the introduction of any further evidence, and moved the Court to dismiss the petition with prejudice on the grounds that the petition shows on its face that the Court is without authority to allow compensation to Mr. Newport on any allegations contained therein, and that there was no court authorization for his services except the two orders referred to above. [Rep. Tr. p. 30, line 15, to p. 31, line 6.]

The Referee sustained the objection and granted the motion. Findings of Fact, Conclusions of Law, and Order dismissing the petition with prejudice were signed and filed November 15, 1955. [R. p. 63.]

A petition for review of said Order was filed by Mr. Newport [R. p. 68] and one by his attorney Mr. Lavine. [R. p. 70.] The Referee filed a Certificate on Review [R. p. 72; see also Appendix hereto, p. 7] and a Supplemental Certificate. [R. p. 80.] The review was heard by Chief Judge, Hon. Leon R. Yankwich, on December 19, 1955. On December 23, 1955, Judge Yankwich filed his Memorandum Opinion on Review [R. p. 83; see also Appendix hereto, p. 15] affirming the order of the Referee of November 15, 1955 (*In re F. P. Newport Corp. Ltd.*, 137 Fed. Supp. 58), and on the same day signed and filed his "Decision on Review" wherein he adopted the Findings of the Referee (except as they related to the timeliness of the review—not an issue here) and affirmed the decision of the Referee. [R. p. 94; see also

Appendix hereto, p. 23.] A formal Order of Affirmance was signed and filed December 27, 1955. [R. p. 95; see also Appendix hereto, p. 24.]

On January 13, 1956, Newport filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. The Trustee in Bankruptcy filed a motion to dismiss the appeal. On March 2, 1956, the Court of Appeals made an order providing, among other things, as follows:

> "Appellee's motion to dismiss is denied.
>
> "The Court deems that the cause should be expedited. The appeal will be heard on the record as forwarded to the Clerk of this court without reproduction, and typewritten briefs are authorized. Time for briefs is shortened to 20 x 20 x 10 from this date.
>
> "On April 12, 1956, the Clerk, subject to approval of the Calendar Committee of this Court, will calendar the case for oral argument at an early date in Los Angeles or San Francisco. Until calendaring for oral argument on the merits, the cause will be retained by the Court as constituted to hear the motion to dismiss."

The appeal was argued before the Circuit Court on April 26, 1956. On June 5, 1956, the United States Court of Appeals filed its decision affirming the Order of the District Court sustaining the referee's disallowance of Newport's claim. (See *Newport v. Sampsell,* 233 F. 2d 944.) Petition for rehearing was denied by the United States Court of Appeals for the Ninth Circuit on July 6, 1956.

Mr. Newport's petition herein demonstrates his familiarity with the operations of the Trusteeship from the beginning, but especially from December 1, 1943. In fact he states [R. p. 29; par. XIII] that he continued

to operate all of the properties and was frequently referred to as "acting trustee." He knew Mr. Metcalf was collecting fees for the operation of the business, and he must have had in mind an intention to make the claim which he has made for $208,950 for fees and expenses. He knew that Mr. Metcalf was removed as Trustee on November 2, 1950, and that Paul W. Sampsell was elected Trustee in his place. Yet he concealed until July 21, 1955, his intention to make a claim for fees. He certainly was under a duty to disclose to Mr. Metcalf, to the Court, and to Mr. Sampsell when he took office the fact that he had such a claim and intended to assert it. Nowhere in his petition [R. p. 29] is there any hint of a disclosure of his intention to claim fees and expenses, prior to the filing of the petition on July 21, 1955.

Mr. Metcalf has been dead since May, 1951. He, and he alone, could have refuted Mr. Newport's sworn statement. The bankrupt estate, the Court, the creditors and Trustee Sampsell are all placed at a disadvantage by his conduct.

The Claim for Fees and Expenses.

The petition [R. p. 29], nine pages long, is full of arguments and self-serving declarations and incorrect statements. If one were to take it seriously, he would conclude that the whole burden of the administration of the estate rested on the shoulders of the petitioner; and that the fact that all the secured indebtedness of the estate has been liquidated, and an additional $407,000 accumulated was due solely to his efforts. An analysis of the petition follows:

Paragraph III contains an incorrect statement of the terms of the Order authorizing his employment. [R. p. 13.] The Order authorized his employment to assist the

Receiver in handling the properties of the estate, not for "handling of the properties of the estate." [R. p. 29, par. III.]

In Paragraph IV he states that he "rendered extraordinary services, for which it was understood and agreed that he would be paid the usual commissions and fees customarily paid in this community." The Order made no provision for "extraordinary services."

Paragraph V is simply a self-serving statement that he "continued his work" after he was discharged until the final sale.

In Paragraph VI he asks for salary at $250 per month from November 30, 1943, to May 3, 1954 (the date when the sale of the remaining assets was confirmed by the Referee) in the sum of $31,750, this being after his employment had been terminated.

In Paragraph VII he takes full credit for the payment to Security-First National Bank of Los Angeles of principal in the sum of $1,116,071.21, real property $222,-042.67, and interest of $356,198.53. These were services which the Trustees were required by law to perform, and for which they were paid.

Paragraphs VIII, IX and XI deal with his efforts to prevent the foreclosure of the Security-First National Bank's trust deed. Assuming that he did what he claims, the services were such as were required of him under the Bankruptcy Act, Section 7 (11 U. S. C. A., Sec. 25). Also, the Trustee is required to perform such services. (Bankruptcy Act, Sec. 47, 11 U. S. C. A., Sec. 75.) In Paragraph XI he asks $12,000 for this "service."

In Paragraph X Mr. Newport takes credit for the oil lease with the Universal Consolidated Oil Company. This lease was executed January 14, 1938, when Mr. Newport

was employed by the Trustee at a salary of $250 per month. However, he asks for compensation in the sum of $80,000.

In Paragraph XII Mr. Newport takes credit for certain concessions made by the City of Long Beach. These negotiations took place during the time the Trustee was attempting to obtain permits from Long Beach to drill the property. Newport was an employee of the Trustee at the time, on a salary.

In Paragraph XIII Mr. Newport claims that he was, in effect, Trustee from 1943 for the balance of Mr. Metcalf's life. The record in the case fails to substantiate his claim; but, on the contrary, demonstrates that Mr. Metcalf was in active charge as Trustee until October, 1950. Certainly, Mr. Newport made no report to the Court of any such circumstances.

In Paragraph XIV Newport deals with an attempted sale of certain real property to Procter & Gamble Manufacturing Company. Objections to the sale were filed by certain creditors and by the bankrupt. Newport did not file any objections. No sale took place. No assets were brought into the estate. (See 173 F. 2d 207.)

Paragraph XV deals with claimant's employing "appraisers and geologists." He claims a fee of $13,000 "20% of the benefits of the monies saved" plus $800 for expenses.

In Paragraph XVI he claims he sold real estate amounting to $429,000 and that his 5% commission is $21,450.

In Paragraph XVII he claims to have made a settlement with the "Sorensons," and for that he asks $3,000.

In Paragraph XVIII he deals with another mortgage for which he asks $25,000.

In Paragraph XIX he claims credit for an increase in the sale price of real property from $350,000 to $407,-000 and asks $5,000 for that service. The record in this Court proves that he opposed the sale or any sale.

In Paragraph XX he claims that, because he opposed a sale of real property, he accomplished a tax saving and for that he should receive $7,500.

In Paragraph XXI he claims credit for rental of his real estate office in the sum of $1,080.

His claim in Paragraph XXII sets out certain transactions with Bankline Oil Company in 1937 (while he was employed by the Trustee), and asks an indefinite sum calculated on 2% from oil and 5% from sale of real estate.

In Paragraph XXIII he claims to have "preserved the waterfront property" and for that he asks 10% of $191,-000 or $19,100.

In Paragraph XXIV he says he "redeveloped the La Crescenta property" and is "entitled to a reasonable sum for this work."

In Paragraph XXV he deals again (see pars. VIII, IX and XI) with attempts of Security-First National Bank to foreclose its trust deed, stating that he *alone* prevented the foreclosure and saved the estate. He asks to "be compensated accordingly." As a matter of fact, Mr. Newport never appeared in that litigation. F. P. Newport Corporation, Ltd. appeared and filed an objection to the petition for leave to foreclose. Likewise Bank of America National Trust and Savings Association filed an objection, as did the Trustee, H. F. Metcalf. The Referee made an Order restraining the sale for a limited period, and the foreclosure sale never occurred.

ARGUMENT.

We shall here discuss in their order the questions to be considered by the Court.

QUESTION 1.

Did the Order of Judge McCormick Dated November 21, 1935, Authorizing the Receiver to Employ Mr. Newport, Become Functus Officio Upon Appointment and Qualification of the Trustee on March 19, 1937?

Judge McCormick, himself, signed the order appointing H. F. Metcalf Trustee of the bankrupt estate and fixing his bond. [R. p. 17.] In that order, he recognized Ernest R. Utley as Referee, and provided that the Trustee's bond should be approved by the Referee. When Referee Utley signed the Order approving the Trustee's bond, the receivership was at an end. (11 U. S. C. A., Chap. 2, Sec. 11; Bankruptcy Act, Sec. 2, subd. 3.)

The order authorizing the Receiver to employ F. P. Newport [Rep. Tr. p. 10, lines 7 and 8; R. p. 13] provided that ". . . said Receiver is authorized and directed to pay said F. P. Newport a salary of $250 per month until the further order of this Court." When the Referee obeyed said Court order and qualified the Trustee, the Court terminated F. P. Newport's employment by the Receiver, for the simple reason that there was no longer a Receiver. Furthermore, if Newport continued to work for the Receiver, his duty would be to conserve the assets, whereas if he worked for the Trustee his duty would be to liquidate the assets. To simply state this proposition is to demonstrate its absurdity.

The Bankruptcy Act, Section 2a (11 U. S. C. A., Sec. 11) provides in part as follows:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may hereafter be held to . . .
>
> "(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified. . . ."

In 6 American Jurisprudence, Section 356, page 760, it is said:

> "Termination of Receivership.—The functions of a receiver in bankruptcy terminate in general upon a dismissal of the petition for the adjudication of the alleged bankrupt from which no appeal is taken, the vacation of the order for a receivership, or the appointment of a trustee in bankruptcy following an order of adjudication. The responsibility of the receiver for the assets in his custody, however, remains, following the appointment of a trustee until the trustee has qualified. In fact, a receiver is amenable to the court until he has accounted to and been discharged by the court."

In *Stanton v. Busch,* 59 F. 2d 668, 669 (C. C. A. 9, 1932), it is said:

> "A glance at section 11, title 11, U. S. C. A. makes it imperative that the order must be reversed. The court's jurisdiction and power is fixed and limited by the section to, '(3) appoint receivers, or

the marshals, upon application of parties in interest, in case the court finds it *absolutely necessary* for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed *or the trustee is qualified.*' (Italics supplied.)

* * * * * * * *

"It is sufficient to say that upon 'qualification of the trustee' (11 U. S. C. A., §11, *supra*) the receiver becomes *functus officio,* and the court had no power to make the order of reference, or any order other than to direct the ancillary receiver to file his account for acts done."

In Remington on Bankruptcy (5th Ed.), Volume 1, Section 350, page 507, it is stated:

"The functions of a receiver cease when a trustee is appointed, and a stay or injunction contained in the order appointing a receiver will likewise simultaneously terminate.

"Levin v. Barker, 122 F. 969, 47 A. B. R., N. S., 241 (1941, C. A. Mo.), cert. den. 315 U. S. 813, 86 L. ed. 1212, 62 S. Ct. 709, Gardner, Circuit Judge: 'Ordinarily the functions of a receiver appointed in bankruptcy proceedings cease with the appointment of a trustee. . . .' (Citing *Stanton v. Busch,* 59 F. 2d 668.)

See, also:

In re F. P. Newport Corporation, Ltd. (Yankwich, D. J.), 137 Fed. Supp. 58.

It is obvious from the plain language of the Bankruptcy Act and the above citations, that the order authorizing the employment of Newport by the receiver became *functus officio* on March 19, 1937, when the *Court* qualified the Trustee.

QUESTION 2.

Was F. P. Newport Entitled to Any Compensation in Excess of $250 Per Month for "Extraordinary" Services Claimed to Have Been Performed by Him Between November 1, 1935, When He Was First Employed, and November 30, 1943, the Date of His Discharge?

The Court's attention is called to the following Newport exhibits: Newport Exhibit 1 [Rep. Tr. p. 10, lines 7-8; R. p. 6]; Newport Exhibit 2 [Rep. Tr. p. 10, lines 7-8; R. p. 13]; Newport Exhibit 3 [Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 20]; and Newport Exhibit 4 [Rep. Tr. p. 13, line 26, to p. 14, line 3; R. p. 27].

Exhibit 1 is the Receiver's petition for authority to employ Newport and fixing his salary. In it the Receiver states that Newport "desires to devote his entire time to aiding and assisting your petitioner until the affairs of the F. P. Newport Corporation, Ltd. are reorganized and rehabilitated to the satisfaction of all creditors." He also recommends that he be authorized to employ the said F. P. Newport upon a "full time basis."

Newport Exhibit 2 is the Order of Judge McCormick authorizing the Receiver to employ F. P. Newport and fixing his salary. It states that "H. F. Metcalf, Receiver herein, be and he is hereby authorized to employ F. P. Newport to assist him in the handling of the properties of said estate" and to pay him "a salary of $250.00 per month commencing with the 1st day of November, 1935, until the further order of this Court."

Newport Exhibit 3 is the petition of the Trustee for authority to employ F. P. Newport and fixing his salary.

In it the Trustee states that he "believes it would be for the best interests of this estate that he be permitted to employ said F. P. Newport *on a full time basis* at a salary of $250.00 per month." Said salary to "commence as of February 23, 1937, and *continue so long as said F. P. Newport shall continue in the employ of said Trustee,* or until the further Order of this Court." (Emphasis added.)

Newport Exhibit 4 is the Order of Referee Utley dated May 17, 1937, authorizing the Trustee to employ F. P. Newport and fixing his salary. In it the Trustee is

> "authorized to employ F. P. Newport as an assistant in the management and operation of the properties of the above named bankrupt and to pay said F. P. Newport for such services the sum of $250.00 per month, said salary to be paid out of the assets of said estate . . . said salary to be payable as of February 23, 1937, and to *continue so long as said F. P. Newport shall be employed by said Trustee* or until the further Order of this Court." (Emphasis added.)

On November 26, 1943, the Trustee wrote a letter to Mr. Newport [Trustee's Ex. A; Rep. Tr. p. 31, lines 7-25; p. 34, line 7, to p. 44, line 9; R. p. 43]:

"November 26, 1943

"Mr. F. P. Newport
Central Bldg.,
Los Angeles, California

Dear Mr. Newport:

The writer has been studying our memoranda of available cash in the various accounts.

I have been discussing this also with Mr. Lynch and I do not know what to do regarding possibility

of payment of future salary to you. You may therefore, accept this as a dismissal of your services beginning December 1, 1943.

Should you care to bring this up for review, it will be quite all right with the writer whatever disposition the Court sees fit to make of it.

Very sincerely yours,

H. F. METCALF Co.,

HFM ahh H. F. Metcalf."

The orders of November 21, 1935, and May 17, 1937, are the only orders ever made for his employment. He admits having been paid the salary provided by those orders, respectively, until November 30, 1943. He has received no salary since then.

In our opinion the two petitions and the two orders referred to above, are a complete answer to the claim of F. P. Newport for any fees or salary for his services from November 1, 1935, to November 30, 1943.

If Newport performed any services not covered by the said orders, they were not covered by any petition nor by any order. The rule governing services performed without an order of the Bankruptcy Court is discussed under Question 3.

QUESTION 3.

Was F. P. Newport Entitled to Any Compensation From the Bankrupt Estate for Services Claimed to Have Been Performed Subsequent to His Discharge by the Trustee on November 30, 1943?

The rule in bankruptcy is that compensation for services will not be allowed unless authority for employment is first obtained from the Court.

General Order in Bankruptcy No. 44;

General Order in Bankruptcy No. 45.

In *In re Loose,* 52 Fed. Supp. 20, 22-23, it is said:

> "It is well established that a court of bankruptcy in a strict sense, is a court of equity, the estate being a trust in the possession of persons completely under the control of the court in so far as they deal with the property subject to its jurisdiction. In such proceedings, as in a court of equity, the court speaks only through its orders or decrees, duly signed or entered . . ."

In *Beecher v. Leavenworth State Bank* (C. C. A. 9, 1950), 184 F. 2d 498, 501, it is said:

> "It has been repeatedly held that an attorney is not entitled to compensation unless there has been full compliance with General Order 44. Albers v. Dickinson, 8 Cir., 127 F. 2d 957, and cases there cited. Further, it appears that on May 23, 1945, the then district judge refused an allowance of $450 to the receiver's attorney for services rendered up to that time 'for the reason that the Receiver has not filed herein any Petition for the appointment of an attorney for said receiver.'

"The district court, in allowing the fee to the attorney for the receiver for the period prior to December 30, 1947, is reversed. He is entitled to fees only for such services after that date, the order then made being a valid compliance with Order 44."

In *In re Eureka Upholstering Co.,* 48 F. 2d 95-96, it is said:

"The forty-fourth General Order in Bankruptcy (11 U. S. C. A., §53) provides that no attorney shall be appointed for a receiver, except by order of court and upon petition of the receiver, supported by the proposed attorney's affidavit. . . . The order and the rule were passed to control serious abuses and are to be strictly observed; without an order of court upon full presentation of the relation of the proposed attorney with all other interests involved, not only may he not be retained, but he can recover nothing, no matter how beneficial, or how arduous, his services.

* * * * * * * *

"The receiver is responsible for the collection of the assets (*In re* Felson (D. C.), 139 F. 275, 280), and he alone can authorize any charges against them. If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver, and if the receiver prove slack, he may apply to the referee to stir him to action. The referee or the judge may then authorize the creditor to proceed, and he will be entitled to his reward under section 64b(2), but not otherwise."

In *Goldie v. Cox,* 130 F. 2d 690, 695, it is said:

"The Bankruptcy Act recognizes the necessity of assistance from the bankrupt to the trustee and credi-

tors in discovering and bringing into the estate all assets (11 U. S. C. A., §§25 and 44; Cameron v. United States, 231 U. S. 710, 717, 34 S. Ct. 244, 58 L. Ed. 448; Sparhawk v. Yerkes, 142 U. S. 1, 15, 12 S. Ct. 104, 35 L. Ed. 915) and such reasonable and ordinary services are due without compensation. Trustees v. Greenough, 105 U. S. 527, 537, 26 L. Ed. 1157, and see Crutcher v. Logan, 5 Cir., 102 F. 2d 612, 613; In re General Carpet Corporation, D. C. E. D. Pa., 38 F. Supp. 200, 203. It is only for extraordinary services—services in addition to and outside of those ordinarily necessary—that the bankrupt can secure compensation (In re Patterson-MacDonald Shipbuilding Co., 9 Cir., 288 F. 546), and then only when there is particular employment for such services. Crutcher v. Logan, 5 Cir., 102 F. 2d 612, 613. Where the bankrupt is a corporation, this same situation applies to officers and directors thereof. Crutcher v. Logan, 5 Cir., 102 F. 2d 612, 613."

See also:

In re Pedisich, 103 Fed. Supp. 199, 200;

In re Owl Drug Co., 16 Fed. Supp. 139, 148;

In re Joslyn, 224 F. 2d 223;

In re Lane Lumber Co., 206 Fed. 780, 788;

Cox v. Elliott, 122 F. 2d 851, 852.

QUESTION 4.

Were the "Extraordinary" Services Claimed to Have Been Performed by F. P. Newport Voluntary, Duplicate Services Which the Bankruptcy Act Requires the Trustee to Perform? Was He Entitled to Compensation for Any Such Services From the Bankrupt Estate?

Bankruptcy Act, Section 47(a) (11 U. S. C. A., Sec. 75), prescribes the duties of a trustee in bankruptcy in detail. The services set forth in the petition of Mr. Newport [R. p. 29] are the same services which the Trustees were required to and did perform, and for which they were paid. Nowhere in his petition does he claim that he demanded of the Trustee that he perform any of the duties set forth in said petition and that the Trustee refused to perform them. The services described by him were voluntary, duplicate services.

In Collier Bankruptcy Manual (2d Ed.), Section 62, page 706, it is said:

> "The duty of a receiver or trustee to render his services in person, or more exactly his duty, on principle, to assume personally the cost of any assistance he may deem desirable, in conjunction with his right, to the exclusion of any other person, to receive compensation for services assigned to him, is one important safeguard to secure economical administration. It is paralleled by another salutary requisite introduced by judicial orders and practice to an ever-increasing extent; namely of an application to the court for authority to hire such help as may exceptionally be needed to perform services requiring special professional or technical skill or knowledge. General Orders 44 and 45 provide for such previous authorization by the court in appointing attorneys, auctioneers, accountants and appraisers for the receiver or trustee. The judicial interpretation of these Orders is rigorous. (Citing *Matter*

of Eureka Upholstering Company (C. C. A. 2), 17 Am. B. R. (N. S.) 735, 48 F. 2d 95.)"

In *In re Owl Drug Co.*, 16 Fed. Supp. 139 at 148, it is said:

"And unpleasant though the task of rejecting claims of attorneys for services *actually* rendered in bankruptcy, when either *not* authorized or incurred *in violation* of the General Orders in Bankruptcy or of rules of court, may have been, at times, courts have performed it repeatedly and unhesitatingly. See Weil v. Neary (1929), 278 U. S. 160, 49 S. Ct. 144, 73 L. Ed. 243; In re G. W. Giannini, Inc. (D. C. N. Y., 1936), 14 F. Supp. 1005.

"One can readily see the wisdom of these rulings. Were the law otherwise, there would be no limit to the burden which might be placed upon an estate if attorneys for the bankrupt or individual creditors could, by doing work which *it is not* their duty to do, by assisting the trustee, without an order of court allowing their special employment, burden the estate with the added cost of performing work which it is *the duty* of others to perform. The bankruptcy court would lose control in the matter of fees. 'Volunteers' would be numberless. And it is almost certain that in every estate of *any* size, the courts would be confronted with claims for 'voluntary' assistance. Hence the practical wisdom of these rulings, sanctioned by our own Circuit Court, that the attorney for the bankrupt be not compensated for work which the bankrupt *is not* under legal obligation to do, but *which it is the duty of the receiver, trustee or their attorneys to perform.*"

See also:

In re New York Investors, 48 Fed. Supp. 900, 902-903;

In re Joslyn, 224 F. 2d 223 (June 23, 1955);

Whittla v. Nelson, 213 Fed. 587, 589-590.

QUESTION 5.

Is F. P. Newport Estopped by His Laches From Asserting Any Claim for Compensation and Expenses From the Bankrupt Estate?

F. P. Newport is the president and principal stockholder of the defunct, dissolved, bankrupt corporation. He had been employed first by the Receiver and then by the Trustee H. F. Metcalf from November 1, 1935, to November 30, 1943. As set forth in the Statement of Facts he claims to have been known as the "acting trustee" from December 1, 1943, to May 3, 1954. He now claims fees and commissions and reimbursement for expenses covering the whole period from November 1, 1935, on. Had he asserted a claim for extraordinary services for the period between November 1, 1935, and November 30, 1943, the Court, the then Trustee of the bankrupt estate and the creditors would have had the advantage of the Trustee's testimony to refute such claim. The same is true with regard to Mr. Newport's demand for fees and expenses from December 1, 1943, until the Trustee Metcalf became incapacitated in October, 1950, and Trustee Sampsell would have had the advantage of Mr. Metcalf's testimony. Death has closed the lips of Mr. Metcalf, and the conduct of Mr. Newport has rendered it exceedingly difficult, if not impossible, to refute his extravagant claims. Under the circumstances it is the position of Respondent that, in addition to all of the other reasons given in this brief for the dismissal of said petition with prejudice, the Trustee has a right to claim that Mr. Newport is estopped by his conduct to assert any claim for compensation or reimbursement at this late date.

In 19 American Jurisprudence, Estoppel, Section 42, pages 640-643, it is said:

"The doctrine of estoppel *in pais* is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice. It always presupposes error on one side and fault or fraud upon the other and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. It concludes the truth in order to prevent fraud and falsehood and imposes silence on a party only when in conscience and honesty he should not be allowed to speak. Estoppel of this character arises from the conduct of a party, using the word 'conduct' in its broadest meaning as including his spoken words, his positive acts, and his silence when there is a duty to speak, and proceeds on the consideration that the author of a misfortune shall not himself escape the consequences and cast the burden on another. Accordingly, it holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury.

"The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are:

(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially."

Section 50, pages 650-652:

"Generally speaking a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action."

Section 55, pages 661-662:

"An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by 'standing by,' and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there are a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent.'"

Section 490, page 339:

"Suit to enforce an equitable claim or cause of action may be held to be barred by the complainant's laches or procrastination in the assertion of his right or equity, where the institution of suit has been delayed during an 'unreasonable' period of time. It is said that 'reasonable diligence' is essential to call into action the powers of a court of equity.

"'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. . . . Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.'"

In Restatement of Law, Restitution, Section 148, Laches and Statutes of Limitations, page 589, paragraphs (1) and (2), it is said:

"(1) In proceedings in equity, a person otherwise entitled to restitution is barred from recovery if he has failed to bring or, having brought has failed to prosecute, a suit for so long a time and under such circumstances that it would be inequitable to permit him now to prosecute the suit.

"(2) A cause of action for restitution may be barred by lapse of time because of the provisions of a statute of limitations."

Under comment on subsection (1), subdivision d, page 592, it is said:

"d. Chance of error. If the lapse of time has caused doubt as to the ascertainment of the facts, as where witnesses have died or papers have been lost, or where the time elapsed is so great that witnesses may have forgotten the facts, the chance that the respondent will be dealt with unjustly may be sufficiently great to prevent the granting of restitution."

In *Halstead v. Grinnan*, 152 U. S. 412, 38 L. Ed. 495, 496-497, it is said:

"Mr. Justice Brewer delivered the opinion of the court:

"The plaintiff, by this suit, invoked the aid of a court of equity to set aside a survey which had stood unchallenged for over twenty-five years. Such a long delay suggests laches, and a careful examination of the testimony satisfies us that the circuit court did not err in sustaining this defense. The defense itself is one which, wisely administered, is of great public utility, in that it prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice, for so strong is the desire of every man to have the full enjoyment of all that is his, that, when a party comes into court and asserts that he has been for many years the owner of certain rights, of whose existence he has had full knowledge and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found that his alleged rights either never existed, or had long since ceased. We have had before us lately several cases in which this defense has been presented, and in which the rules determining it have been fully stated and its value clearly demonstrated; *Hammond v. Hopkins*, 143 U. S. 224 (36:134), and cases cited in the opinion; *Felix v. Patrick*, 145 U. S. 317 (36:719); *Foster v. Mansfield, C. & L. M. R. Co.*, 146 U. S. 88 (36:899); *Johnston v. Standard Min. Co.*, 148 U. S. 360 (37:480). . . . And yet, as said by Mr. Justice Brown, speaking for the court in *Foster v. Mansfield, C. & L. M. R. Co., supra:* 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law

which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.'"

In *City of Glendale v. Coquat* (Ariz.), 52 P. 2d 1178, 102 A. L. R. 837, 840, it is said:

"Equitable estoppel may be defined as the effect of the voluntary conduct of a party, whereby he is absolutely precluded from asserting rights which might have otherwise existed as against another person who, in good faith, has relied upon such conduct and has been led thereby to change his position for the worse. The essential elements of estoppel are that plaintiff, with knowledge of the facts, must have asserted a particular right inconsistent with that asserted in the instant action, to the prejudice of another who has relied upon his first conduct. Moore v. Meyers, 31 Ariz. 347, 253 P. 626."

In *Thomasson v. Walker* (Va.), 190 S. E. 309, 110 A. L. R. 593, 598, it is said:

"In Moyers Coal Corporation v. Whited, 157 Va. 302, 160 S. E. 43, 46, this court adopted the rule of equitable estoppel as laid down in 4 Amer. & Eng. Decs. in Eq. 258, and followed in Chesapeake & Ohio R. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914:

"'The general rule of equitable estoppel or, as it is frequently called, estoppel *in pais*, is that when one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another, who has a right to rely upon those statements, etc., and who does rely upon them in good faith, to believe in the existence of the state of facts with which they are compatible, and act upon that belief,

the former will nott be allowed to assert, as again
the latter, the existtence of a different state of fac
from that indicatedl by his statements or conduct,
the latter has so ffar changed his position that h
would be injured tlhereby.' "

In *Deitrick v. Greaney* (Mass.), 309 U. S. 190-20
84 L. Ed. 694, 699, it iss said:

"It is a principlle of the widest application tha
equity will not permit one to rely on his own wrong
ful act, as against tthose affected by it but who hav
not participated in it, to support his own asserte
legal title or to defeat a remedy which except fo
his misconduct would not be available. See Unite
States v. Dunn, 268 U. S. 121, 133, 69 L. ed. 87
882, 45 S. Ct. 451l; Independent Coal & Coke Co
v. United States, 274 U. S. 640, 648, 71 L. ed. 127
1278, 47 S. Ct. 714."

The Court is also referred to the discussion of th
questions involved in tlhis appeal, contained in the Ref
eree's Certificate on Rewiew dated December 6, 1955 [R
p. 72; see also Appendix, p. 7] and to Chief Judg
Yankwich's Decision om Review [R. p. 94; see also Ap
pendix, p. 23] dated December 23, 1955, his Memo
randum Opinion on Review dated December 23, 195
[R. p. 83; see also Appendix, p. 15], and his Orde
Affirming the Order off the Referee dated December 27
1955. [R. p. 95; see also Appendix, p. 24.] Copies o
these documents are set forth in the Appendix attache
hereto.

QUESTION 6.

Is the Trustee in Bankruptcy Estopped From Asserting Any Claim for Compensation and Expenses From the Bankrupt Estate?

There is no basis for petitioner's claim that "the Trustee is estopped to deny the compensation for the services and must pay the reasonable value of the services to Mr. Newport."

In the first place, F. P. Newport during the whole administration of the estate until the final sale on May 3, 1954, was engaged, not in any effort on behalf of the Trustee, but in a scheme to impede and delay the liquidation of the estate in the vain hope of a reorganization of the bankrupt estate, using the creditors' assets, without contributing anything himself. In this connection the Court is referred to *In re F. P. Newport Corporation, Ltd.*, 123 Fed. Supp. 95, and *Newport v. Sampsell*, 216 F. 2d 344, and to the affidavit of Norman A. Bailie filed in support of the Trustee's Motion to Dismiss the appeal of F. P. Newport to the United States Court of Appeals for the Ninth Circuit in this very case.

But aside from the matters set forth in the preceding paragraph, there can be no estoppel against a Trustee in Bankruptcy.

In *Stanolind Oil & Gas Co. v. Logan*, 92 F. 2d 28, 31-32, it is said:

> "Appellants rely upon ratification by Isaacs as trustee and estoppel against him by his course of conduct. There was no express ratification by Isaacs

and no order of the bankruptcy court to that effect. Conceding for the sake of argument that Isaacs might be estopped as an individual dealing with his own property, as an officer of the court he was without capacity to do any act that would prejudice the estate under his administration or to waive the exclusive jurisdiction of the bankruptcy court. Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645; Whitney v. Wenman, 198 U. S. 539, 25 S. Ct. 778, 49 L. Ed. 1157; Lincoln Nat. Life Ins. Co. v. Seales (C. C. A.), 62 F. 2d 582."

See also Opinion of the United States Court of Appeals for the Ninth Circuit in *Newport v. Sampsell,* 233 F. 2d 944.

PETITIONER'S BRIEF.

Petitioner's Statement of the Case.

The petition has many statements of alleged facts which are not supported by the record. F. P. Newport was not instrumental in "bringing in any money" either to pay off the secured or the unsecured creditors. He opposed the settlement with the Security-First National Bank of Los Angeles both before the Referee and on review before the District Court. He opposed the order of liquidation of the estate. The bankrupt, through F. P. Newport and others opposed the sale of the assets "or any sale," through the Referee, the District Court, the United States Court of Appeals for the Ninth Circuit, on the rehearing before the Ninth Circuit, by petition for writ of certiorari before the Supreme Court, and by petition for rehearing before the Supreme Court. (*Newport v. Sampsell*, 216 F. 2d 344; cert. den. March 28, 1955; reh. den. May 9, 1955.)

The attitude of the bankrupt and of F. P. Newport, its president, received the attention of the Honorable Leon R. Yankwich, Chief Judge of United States District Court for the Southern District of California when the above matter was before him on review of the Referee's decision confirming the sale of the estate's assets. Judge Yankwich's memorandum opinion is reported in 123 Fed. Supp. 95. We quote from pages 96-98 of the opinion as follows:

> "The bankrupt and certain unsecured creditors seek to review an Order of the Referee dated May 3, 1954, confirming a sale of all the assets of the bankrupt, except certain cash, to R. T. Colter and Robbie E. Colter, his wife, as joint tenants for the sum of $407,000. Involved were 25 pieces of real property

and some personal property and interests in a leasehold, deed of trust and promissory notes. The estate has been in court for over nineteen years. It began as an involuntary proceeding filed on March 19, 1935. An adjudication was made on January 12, 1937. Throughout the proceedings, it has been the attitude of the bankrupt that, *if given long enough time,* its difficulties could be worked out.

"This review must be considered in the light of this attitude and against the background of a 'protracted' administration. —as the judge who handled it for many years characterized it. For it was the contention of the bankrupt at the conclusion of the hearing before the Referee on the Petition to Sell that, *at all times,* matters could have been worked out differently. But the Referee correctly stated:

> " 'A bankrupt case is a lot different than where the property is in private hands. If the man has property in his own hands not subject to legal process or creditors' claims, he can wait indefinitely. But a bankrupt estate can't. *It is the creditors' funds and they are entitled to get paid sometime.* The only question here is haven't we come to the end of the trail? *How much longer are we going to put the creditors off, how much longer are they going to be put off before they get their money? If I had any evidence before me to show that you could within a reasonably short time—any definite evidence—get a better buyer that would be an entirely different situation.* (Page 586) (Emphasis added.)'

"Significantly, the two most recent acts in the bankruptcy proceeding, which occurred before the present Order of Sale, were opposed *upon the same nebulous ground that, as the condition of the estate*

is improving, additional time might bring better results.

"So we find that when there came before the Court the question of compromising a claim of Security First National Bank of Los Angeles, one of its largest creditors, the Court delayed confirmation from April 30, 1951, to October 2, 1951, in the hope that a better offer or a different solution would be found. To the Order confirming the Compromise, dated October 22, 1951, the Honorable Paul J. McCormick, a Judge of this court of long experience, who, despite retirement, undertook the laborious task of continuing to act in this case, appended a statement to this effect:

> " 'It is to be observed that the court has since the submission of this review deferred decision for almost four months to accord all parties interested in this bankrupt estate to submit for consideration *a plan or method that is more beneficial and equitable to the estate than the compromise under review. None such has been presented or offered.'* (Emphasis added.)

"A similar situation arose when the Court was confronted with the review of an Order of the Referee, dated May 26, 1952, ordering liquidation. Bankruptcy Act, §2, sub. a(7), 11 U.S.C.A. §11, sub. a(7). Judge McCormick kept the matter under submission from July 24, 1952, to November 28, 1952. His Order confirming the Order of Liquidation, which has now become final, contained the following statement:

> " 'Although thoroughly argued by the respective parties on the hearing and it appearing at that time to be warranted by the record and files of this protracted bankruptcy proceeding, it was

believed by the Judge that if decision on the Referee's order of liquidation *were deferred for a reasonable period, some other lawfully-authorized equitable method of settlement would be forthcoming and duly proposed. Such other proceeding now seems to be unavailable.* (Emphasis added.)'

* * * * * * * *

"The contention that it is still possible to reorganize the corporation is illusory. No valid plan of reorganization has been proposed during the course of this long administration. And the Referee, having ordered liquidation on May 26, 1952, an Order which has been affirmed by this court, and *has become final,* this Court is not in a position, at the present time, to undo *the finality of that act* and start once more on the laborious process of attempting to reorganize the bankrupt estate after a nineteen years 'protracted' bankruptcy proceeding. The Referee found specifically that the objectors have not produced any substantial person willing to advance the moneys to liquidate the estate in any other manner and that the sale of all the assets was the only alternative."

The attitude and the activities of F. P. Newport throughout the twenty-one year history of this bankruptcy consisted of delay and obstruction, becoming more and more violent and frantic as the final liquidation of the assets approached. Chief Judge Yankwich's narration of Newport's obstructions could well be supported by many other instances of his interference with the Trustee—all a part of his delaying tactics. Further comment on petitioner's statement of the case is deemed unnecessary.

Petitioner's Questions.

Petitioner's questions, found on pages 13-31 of his brief are dealt with in the answers to Respondent's questions, as follows:

Petitioner's Questions	Petitioner's Brief—Page	Respondent's Questions	Respondent's Brief—Page
I	13	1	17
II	13	1	17
III	13	1	17
IV	13-14	2, 3, 4	20-27
V	14	6	35
VI	14	2, 3, 4	20-27

Repetition would only prolong this brief unnecessarily. We suggest, in addition, that if after November 30, 1943, Newport performed services for the Trustee with the latter's consent, and without an Order of Court authorizing his employment, his only claim, if he had any, would be a personal claim against the Trustee and not against the bankrupt estate. See Collier's Bankruptcy Manual (2nd ed.) Sec. 62, page 706 and cases cited, quoted at page 26 of this brief.

VII.

Petitioner's contention that the Referee erred in refusing to receive evidence is based on his false premise that Judge McCormick's order of November 21, 1935, continued to exist and be in force after the election and qualification of the Trustee (Respondent's question No. 1 and cases cited). In the absence of an order authorizing his employment, all the services detailed by petitioner (assuming without conceding that they were performed) could form no basis of a claim for compensation from the estate. It follows that the petition for compensation formed no basis for a claim against the estate, and that the Referee's

order excluding evidence and dismissing the petition with prejudice was proper, that it was within his jurisdiction, and that he did not abuse his discretion in making the order of dismissal. In fact, we think it was the only order which, under the circumstances, he could properly make.

VIII.

Petitioner's question VIII, "Whether the claims of Newport should have been heard by the District Court Judge and not the Referee," is answered by 11 U. S. C. A. Ch. 1, Sec. 1, subd. 10, Bankruptcy Act, Secs. 1, 10; and by 11 U. S. C. A. Ch. 4, Sec. 45, Bankruptcy Act, Sec. 22(a) and (b). Bankruptcy Act, Sec. 1(10) designates United States District Courts as courts of bankruptcy, and Bankruptcy Act, Sec. 22(a) and (b) provide that "the judge may at any stage of the proceeding * * * refer the same to a referee, either generally or specially." Section 22(b) authorizes the judge to transfer the case from one referee to another.

Petitioner's Argument.

We have examined the authorities cited by counsel for petitioner in support of the Petition for Writ of Certiorari. All except three were cited in his brief in the United States Court of Appeals for the Ninth Circuit. With the exception of *In Re Lustron Corporation,* 196 F. 2d 975, none have any bearing on fees in bankruptcy. The additional authorities cited by petitioner herein, namely, *L. A. Times-Mirror v. Superior Court,* 3 Cal. 2d 309, and *Imperial Assurance Co. v. Livingston* (8th Cir.), 49 F. 2d 745, 74 A. L. R. 1336, are in the same category. His reference to 14 Am. Jur. Sec. 74 fails to state the subject to which he refers.

Los Angeles Times-Mirror v. Superior Court, 3 Cal. 2d 309, involves a motion to exclude evidence. The Supreme Court of California held that because *some material substantial facts* were stated in the complaint, the motion should be denied. No material substantial facts are alleged in Newport's petition for fees and expenses.

Imperial Assurance Co. v. Livingston, 49 F. 2d 745, 74 A. L. R. 1336 is a bankruptcy case. A receiver in bankruptcy, who had charge of the assets, took out an insurance policy on a building after the trustee was elected and qualified, but before the trustee had taken possession. The building was destroyed by fire; and the insurance company claimed the policy was void because the receiver had no insurable interest after the qualification of the trustee. The Court held that "until the custody is actually out of the receiver, he has the power to protect such property by insurance."

In re Lustron Corporation, 196 F. 2d 975 was a case involving three petitions for attorneys' fees. The petitioners were (1) attorneys for the petitioning creditors, (2) special counsel for the trustees appointed by the Court, and (3) attorneys for the bankrupt. It has no bearing on this case. It deals with a special statute (Bankruptcy Act, Sec. 64a, subd. (1), 11 U. S. C. A., Sec. 104) authorizing the Court to allow reasonable attorneys' fees to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases. Two of the petitioners are covered by the statute. The third petitioner—special counsel for the trustees—was covered by an Order of Court under General Order 44.

Petitioner has cited neither statute nor decision which supports his contentions and we have found none.

Petitioner bases his claim to compensation on three false premises, namely:

1. That the Order of Judge McCormick continued to exist after the election and qualification of the Trustee in bankruptcy, and that F. P. Newport was still employed pursuant to said Order until the assets were sold.
2. That the services performed by F. P. Newport, as detailed in his petition, were beneficial to the estate, and should be compensated irrespective of any order.
3. That the services alleged to have been performed by him during the time he was employed by the Trustee, and prior to his discharge by the Trustee, were not fully compensated for by monthly salary paid to him by the Trustee.

Petitioner completely ignores the provisions of the Bankruptcy Act and the purpose of the law. His conduct throughout the twenty-one years demonstrates his idea that bankruptcy was "tailor made" for his benefit, namely: To hold his creditors in check, no matter how long, until something "turned up" to enable him to reorganize his corporation, at the expense of the creditors, and to his own financial advantage. The very claim he filed is ample proof of his scheme. The Court is also referred to the answers to Respondent's questions 1, 2, 3 and 4 on pages 17 to 27 hereof, respectively.

Conclusion.

In conclusion we submit that petitioner states neither facts nor law to provide any important reason, nor in fact any reason for the Supreme Court to grant his petition for writ of certiorari (Rule 19 of the Supreme Court).

His petition for writ of certiorari, like his petition for review of the Referee's order, his appeal to the United States Court of Appeals for the Ninth Circuit, and his petition for rehearing before said Court, is based on the erroneous theories (a) that an order of a District Court authorizing a receiver in bankruptcy to hire an assistant, lives on after the election and qualification of a Trustee in bankruptcy, and (b) that petitioner is entitled to compensation from the estate for "extraordinary" services he claims to have performed, both while employed by the Receiver and Trustee, respectively, and after his discharge by the Trustee, without any order of court authorizing his employment. Both theories have been shown to be false, and opposed to the provisions of the Bankruptcy Act and the uniform decisions of the court.

We respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BAILIE, TURNER, LAKE & SPRAGUE,
By NORMAN A. BAILIE,
NORMAN A. BAILIE and
RICHARD A. TURNER
Attorneys for Respondent, Paul W. Sampsell, as Trustee.

APPENDIX.

Findings of Fact, Conclusions of Law, and Order Dismissing Claims of F. P. Newport for Fees.

In the District Court of the United States, Southern District of California, Central Division.

In the Matter of F. P. Newport Corporation, Ltd., a corporation, Bankrupt. In Bankruptcy No. 25308-Y.

F. P. Newport having filed herein his verified petition for an allowance of compensation for services alleged to have been performed by him for the benefit of the estate of F. P. Newport Corporation Ltd., a corporation, bankrupt, and written objections to said petition having been filed by Paul W. Sampsell, Trustee herein, by Bank of America National Trust and Savings Association and by Wm. H. Neblett, Esq., unsecured creditors of said bankrupt, and the matter having come on regularly to be heard on September 19, 1955, at 10 o'clock a.m. before the Honorable Reuben G. Hunt, Referee, pursuant to notice to creditors duly given according to law; petitioner appearing in person and by his counsel Morris Lavine, Esq.; the trustee appearing by his counsel Bailie, Turner, Lake & Sprague by Norman A. Bailie, Esq.; Bank of America National Trust and Savings Association appearing by its counsel Edmund Nelson, Esq. and Winfield Jones, Esq.; and certain evidence both oral and documentary having been introduced on the part of the petitioner, and on the part of the objectors; and counsel for objectors having objected to the introduction of further evidence in support of said petition of F. P. Newport for compensation for extraordinary services, on the ground that said petition on its face shows that the Court is without authority to allow petitioner any compensation on any ground set forth

in said petition; and said objectors having moved the Court on the same ground to dismiss said petition with prejudice; and the Court having heard the arguments of counsel for petitioner and of counsel for objectors, and having examined the authorities cited by said counsel, and having made an independent examination of authorities bearing on the subjects, and having taken judicial notice of the record in this proceeding, and being fully advised in the premises, and having sustained the objections of counsel for objectors, and having granted the motion of counsel for objectors to dismiss said petition with prejudice, now makes and files his FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER as follows:

FINDINGS OF FACT.

1. F. P. Newport Corporation, Ltd. was a corporation organized pursuant to the laws of the State of Delaware. F. P. Newport was a director and President of said corporation; he and his wife Letitia Newport own approximately 90% of the issued and outstanding shares of said corporation.

2. An involuntary petition in bankruptcy was filed against said F. P. Newport Corporation Ltd. on March 19, 1935, and on March 25, 1935, the Honorable Paul J. McCormick, Judge of the above entitled Court, made and filed his Order appointing H. F. Metcalf Receiver of the estate of said alleged bankrupt, and said Metcalf qualified as such Receiver and continued to act as such Receiver until his election and qualification as Trustee in Bankruptcy as hereinafter set forth.

3. On November 21, 1935, the Honorable Paul J. McCormick made and filed his Order authorizing said Receiver to employ said Newport to assist him in the

handling of the properties of the bankrupt estate and directed said Receiver to pay him a salary of $250 per month commencing November 1, 1935, until the further Order of the Court. The said $250 per month covered all services rendered by Newport to the Receiver.

4. Said Newport entered upon the discharge of his duties pursuant to said Order, and continued to be employed by said Receiver until the election and qualification of the Trustee herein H. F. Metcalf, on March 19, 1937, who thereupon succeeded the Receiver in office and the latter was thereupon discharged.

5. On May 17, 1937, Ernest R. Utley, Referee herein, made and filed an Order authorizing the Trustee H. F. Metcalf to employ said Newport as an assistant in the management and operation of the properties of said bankrupt at a salary of $250 per month, said salary to be payable as of February 23, 1937, and to continue as long as said Newport should be employed by said Trustee or until the further order of the Court.

6. Said Newport was employed by said Receiver from November 1, 1935, to February 23, 1937, and he was fully paid by the Receiver for all services performed by him as such employee of said Receiver, and at the rate provided for in said Order of November 21, 1935.

7. Said Newport was employed by said Trustee from February 23, 1937, to November 30, 1943, and he was fully paid by the Trustee for all services performed by him as such employee of said Trustee, and at the rate provided for in said Order of May 17, 1937.

8. On November 26, 1943, the Trustee H. F. Metcalf notified said Newport in writing that he was dismissed as of December 1, 1943. Said Newport received said written

notification by United States mail on or about November 26, 1943.

9. No payments of salary were made to said Newport after the payment of salary for the month of November, 1943, and said Newport made no demand on the Trustee for further salary.

10. No order of Court was made for the employment of said Newport except the Orders referred to in paragraphs 3 and 5 of these Findings.

11. The alleged extraordinary services set forth in F. P. Newport's petition herein detail services which it was the duty of the Receiver and of the Trustee, respectively, to perform, which petitioner was under no duty to perform, and which if performed by him were volunteer services for which the Bankruptcy Act does not permit any payment.

12. The Court finds, in taking judicial notice of its own records in this case, as follows from such records: The report filed by the Trustee in Bankruptcy Sampsell on June 3, 1955, shows a final balance of cash on hand, available for final distribution, for expenses of administration and dividends to unsecured creditors, both prior and general, of $414,314.79. Tax claims filed as expenses of administration and unpaid amount to $132,300.94, all of which are in litigation. L. M. Cahill, the attorney for the bankrupt corporation, in addition to the $10,500.00 paid him on account, has filed a claim for further compensation in the sum of $34,500.00, which claim is still pending undetermined. Since the filing of the said account, the Trustee has paid, upon the order of the Court $750.00 for allowed priority labor claims, $471.25 for priority tax claims, and $15,000.00 on account for services of the coun-

sel for the Trustee in Bankruptcy. The total amount of general allowed claims is $185,705.59, upon which has been paid a first dividend of 25% amounting to $46,426.40. F. P. Newport has been paid $25,466.62 as salary for services to the estate, $5,147.40 for auto mileage, and $825.00 for services as a realtor. The petition filed on July 21, 1955, by Mr. Newport for fees requests the allowance of some $127,100.00 for services and $34,400.00 for expenses, in addition to these amounts previously paid.

Conclusions of Law.

From the foregoing Findings the Court concludes:

I.

That neither the petition for fees nor the evidence presented shows any right of petitioner to any recovery of fees from the Estate.

II.

That the objection to the introduction of evidence herein should be sustained.

III.

That the motion of objectors to dismiss with prejudice F. P. Newport's petition for fees herein should be granted.

Order.

It Is Hereby Ordered that the claim of F. P. Newport for fees be and it is hereby dismissed with prejudice.

Dated the 15th day of November, 1955.

Reuben G. Hunt,
Referee in Bankruptcy.

Received copy of above FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER the 8th day of November, 1955.

MORRIS LAVINE,
By V. TAFT,
(Morris Lavine)

ABOVE FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER ARE HEREBY APPROVED

Dated: November 7, 1955

EDMUND NELSON and WINIFIELD JONES
By s/ Winfield Jones
Attorneys for BANK OF AMERICA, etc. (Objector)

(Wm. H. Neblett) (Objector)

BAILIE, TURNER, LAKE & SPRAGUE
By Norman A. Bailie
(Norman A. Bailie)
Attorney for Paul W. Sampsell,
Trustee in Bankruptcy

Received copy of above FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER the 8 day of November, 1955

s/ Wm. H. Neblett (Objector)

In the District Court of the United States, Southern District of California, Central Division.

In the Matter of F. P. Newport Corporation, Ltd., a corporation, Bankrupt. No. 25,308-Y.

Certificate of Referee on Reviews of His Order Dismissing the Petition of F. P. Newport for Fees.

This is an involuntary proceeding in bankruptcy, commenced on March 19, 1935. Thereafter H. F. Metcalf was appointed and qualified as Receiver in Bankruptcy of the estate. An adjudication in bankruptcy was made on Jan. 12, 1937, and the case referred for administration to Ernest R. Utley, then a Referee in Bankruptcy of this Court. The said H. F. Metcalf acted as Receiver in Bankruptcy until Feb. 25, 1937, when Hubert F. Laugharn was appointed and qualified as Trustee in Bankruptcy. Thereafter, and on Mar. 18, 1937, former Judge Paul J. McCormick of this Court disaffirmed and set aside the order appointing Hubert F. Laugharn, as Trustee in Bankruptcy, and appointed H. F. Metcalf as Trustee in Bankruptcy in his place and stead. Thereafter, H. F. Metcalf acted as such Trustee in Bankruptcy until Nov. 20, 1950, when Paul W. Sampsell was appointed Trustee in Bankruptcy in his place and stead and qualified as such on Nov. 21, 1950. Since that time the said Paul W. Sampsell has been the duly appointed, qualified and acting Trustee in Bankruptcy of the estate.

On Nov. 21, 1935, Judge McCormick authorized the said H. F. Metcalf, as such Receiver in Bankruptcy, to employ F. P. Newport to assist him in handling the properties of said estate and to pay said Newport a salary of $250.00 per month commencing with the first day of November, 1935, until the further order of this court.

The said Receiver in Bankruptcy became *functus officio* on Feb. 25, 1937, when said Hubert F. Laugharn was appointed and qualified as such Trustee in Bankruptcy. *Stanton v. Busch* CCA 9, 21 ABR, NS, 509, 59 F. (2) 668. Thereafter, and on May 17, 1937, the said Ernest R. Utley, Referee in Bankruptcy entered an order authorizing the said H. F. Metcalf, as Trustee in Bankruptcy, to employ said F. P. Newport at a salary of $250.00 per month as an assistant in the management and operation of the properties of the above named bankrupt and to pay to said F. P. Newport for such services the sum of $250.00 per month, said salary to be paid out of the assets of said estate, and to be charged as expenses of administration of said bankrupt estate, said salary to be payable as of Feb. 23, 1937, *and to continue so long as said F. P. Newport shall be employed by said trustee, or until* the further order of this Court.

Thereafter, pursuant to the said order, the said F. P. Newport performed such services and was paid said salary until Dec. 1, 1943, when the said H. F. Metcalf, as such trustee in bankruptcy notified him that his services would be no longer required from and after Dec. 1, 1943. Thereafter, no salary of any kind was paid to the said F. P. Newport, either by said H. F. Metcalf, Trustee in Bankruptcy, or the said Paul W. Sampsell as such Trustee in Bankruptcy. During said twelve year period, F. P. Newport made no effort to collect from the estate any salary of any kind for any services, although the record of the proceedings in this case shows that at all times during the twelve year period there was sufficient money available in the estate to pay such salary.

On July 21, 1955, the said F. P. Newport, the president and principal stockholder of the bankrupt corporation, filed

his claim for fees in which he requested the allowance of $31,750.00 as unpaid salary from Nov. 30, 1943, to May 3, 1954, at the rate of $250.00 per month, (upon the theory that the order made by Judge McCormick authorizing the receiver to employ Mr. Newport upon a salary of $250.00 per month has remained in full force and effect through the administration of the estate in spite of the termination of the receivership upon the appointment and qualification of a Trustee in Bankruptcy), plus $33,600.00 for alleged expenses, plus $175,350.00 for alleged extraordinary services, or a total of $208,950.00. He also requests compensation in an unnamed amount for other alleged services. The alleged expenses are not itemized. Bankruptcy Act, Sec. 62a.

Thereafter and on Aug. 2, 1955, the said Paul W. Sampsell, Trustee in Bankruptcy, filed objections to this claim of F. P. Newport. The said claim and the said objections thereto were heard before the undersigned Referee in Bankruptcy, before whom the administration of the bankrupt estate is now pending, on Sept. 19, 1955, and at the conclusion of the taking of evidence and the submission of the petition to him for decision, the Referee announced his oral decision that the said petition should be denied. He stated that, in his opinion, the order of Judge McCormick directing the Receiver in Bankruptcy to employ Mr. Newport ceased to be in force and effect upon the termination of the receivership and the appointment and qualificiation of a trustee in bankruptcy, and that, therefore, no more salary was due F. P. Newport than which has already been paid to him, and that it was significant that F. P. Newport had done nothing about this salary matter for a period of nearly twelve years.

The Referee further stated that the evidence showed that the alleged extraordinary services performed, and expenses incurred, by F. P. Newport were purely voluntary on his part, and without any court authorization, and, at most, a mere duplication of services performed by the Trustee in Bankruptcy and its counsel.

In making his decision, the Referee followed the rulings in the following cases: *In re Owl Drug*, DC, Nev., 31 ABR, NS, 763, 16 F. S. 139; *Cox v. Elliott*, CCA 8, 47 ABR, NS, 252, 132 F. (2) 851; *In re Siegel*, SD, N. Y. 41 ABR, 753, 252 F. 197; *In re Porto Rican American Tobacco*, CCA 2, 45 ABR, NS, 97, 117 F. (2) 599; *Goldie v. Cox*, CCA 8, 50 ABR, NS, 558, 130 F. (2) 691; *Crutcher v. Logan*, CCA 5, 39 ABR, NS, 12, 105 F. (2) 612; *Watters v. Hamilton Gas*, SD, W. Va., 42 ABR, NS, 721, 29 F. S. 436; *In re Virginia Oil & Refining*, CCA 5, 39 ABR, NS, 12, 102 F. (2) 613.

Thereafter, pursuant to Gen. Rule No. 7 of this Court, and on Nov. 9, 1955, the Trustee in Bankruptcy filed with the Referee proposed Findings of Fact, Conclusions of Law and Order Dismissing the said claim of F. P. Newport for fees. On Nov. 14, 1955, the said F. P. Newport filed his objections to the same with the Clerk of the Court, and not with the said Referee in Bankruptcy. Thereafter, pursuant to an order of the above entitled Court, such objections were sent by the Clerk of the Court to the said Referee in Bankruptcy on Dec. 1, 1955, and filed by the latter in his office as of that date.

On Nov. 15, 1955, the said Referee in Bankruptcy signed, filed and entered his Findings of Fact, Conclusions of Law and Order Dismissing the said claim of F. P. Newport for fees. Thereafter, and on Nov. 23, 1955, the said F. P. Newport filed with the Clerk of this Court,

and not with the said Referee in Bankruptcy, his Petition for Review of the said Findings of Fact, Conclusions of Law, Order and Judgment entered Nov. 15, 1955. In said Petition it is stated that the said Order denied fees to Morris Lavine, attorney for F. P. Newport and the bankrupt corporation. The said Morris Lavine has never applied to this court for the allowance to him of fees of any kind. This last named document was also sent by the Clerk of the Court to the said Referee in Bankruptcy on Dec. 1, 1955 by an order of the above entitled court, and the said Referee in Bankruptcy thereafter filed the same in his office as of the same date.

On Nov. 23, 1955, Morris Lavine, as attorney for F. P. Newport Corporation, Ltd., the bankrupt, and for F. P. Newport, filed with the Clerk of this Court, and not with the said Referee in Bankruptcy, a Petition for a Review of the said Findings of Fact, Conclusions of Law, Order and Judgment entered by the said Referee in Bankruptcy on Nov. 15, 1955. Thereafter, by an order of this court, the said document was sent by the said Clerk to the said Referee in Bankruptcy on Dec. 1, 1955, and filed by the latter in his office on that date.

The said Referee makes the following recommendations:

I.

The Petition of F. P. Newport for a Review be dismissed upon the following grounds:

(a) It was not filed with the Referee in Bankruptcy within ten days after the entry of the order sought to be reviewed, and not until six days thereafter. No extension of such ten day period was requested or granted by the Court. Bankruptcy Act Sec. 39c.

(b) The said Petition for Review does not set forth the alleged errors in respect to the order complained of. Bankruptcy Act Sec. 39c.

(c) The said Petition is without merit.

II.

The said Petition for Review of the said order complained of by Morris Lavine, as attorney-at-law for F. P. Newport Corporation, Ltd., the Bankrupt, and for F. P. Newport, be dismissed upon the following grounds:

(a) It was not filed with the Referee in Bankruptcy within ten days after the entry of the order sought to be reviewed, and not until six days thereafter. No extension of such ten day period was requested or granted by the Court. Bankruptcy Act Sec. 39c.

(b) An attorney-at-law, such as Morris Lavine, cannot sign and file a petition for review. *In re DuPont Young Mfg.* DC. Mass., 1 ABR, NS, 134, 290 F. 393; *In re International Match,* SD, N. Y. 23 ABR, NS, 681, 3 F. S. 443.

(c) The bankrupt corporation is not a person aggrieved by said order. It did not appear and was not a party to the proceedings before the Referee. *In re Rose,* CCA 9, 32 ABR, NS, 404, 86 F. (2) 69. It does not have any direct substantial interest in the Newport petition. *Forsher v. Graham,* CCA 6, 14 ABR, NS, 29, 32 F. (2) 654; *In re Henry Wood Sons,* DC, Mass., 48 ABR, 124, 279 F. 608.

(d) The said Petition is without merit.

The condition of the bankrupt estate, as disclosed by the Fifth Annual Report and Account of Paul W. Sampsell, Trustee, filed Nov. 8, 1955, shows a balance of cash on hand of $343,030.89. Out of this amount there was later allowed to Bailie, Turner, Lake and Sprague, as at-

torneys for Paul W. Sampsell, Trustee, the sum of $2,555.00 on account; to Ralph G. Ritchie, as tax consultant, the sum of $1,140.00; to H. A. Singeltary, as reporter, $15.00; and to the Referee's expense fund, $19.10, making a total of $3,729.10, leaving a net balance of $339,301.79. The total amount of the general allowed claims is $187,906.84, upon which there has been paid a first dividend of 25% amounting to $45,554.19. F. P. Newport filed objections to the payment of this dividend, but later withdrew them. A second dividend of 15% on such general claims was ordered by said Referee on Nov. 29, 1955, although F. P. Newport filed objections to the payment of any further dividends, at least until final determination of his petition for fees. There are pending, undetermined, asserted expenses of administration for Federal taxes in the sum of approximately $130,000 and of California State franchise taxes in the sum of approximately $12,000.00, and the sum of $42,450.00 applied for as compensation by Bailie, Turner, Lake and Sprague, as attorneys for Paul W. Sampsell, Trustee.

In contrast to the $175,350.00 requested by F. P. Newport as compensation for alleged extraordinary services rendered for the benefit of the bankrupt estate, the most that can be paid to the two Trustees in Bankruptcy for their periods of service of about 18 years, cannot exceed $60,877.18 even at the double commission rate provided for by Sec. 48a(3) of the Bankruptcy Act.

So that the Judge may have available, in the event he decides to hear the reviews on their merits instead of dismissing them, accompanying this certificate are all the documents involved in the hearing, including all exhibits,

and besides, the Reporter's Transcript of the hearing, listed as follows:

1. Claim (referred to in the Petitions for Review as "Petition") of F. P. Newport for Fees, and Points and Authorities in Support Thereof, filed July 21, 1955.

2. Objections of Trustee to claim of F. P. Newport for fees, filed Aug. 2, 1955.

3. Findings of Fact, Conclusions of Law and Order Dismissing Claim of F. P. Newport for Fees, filed Nov. 15, 1955;

4. Objections of F. P. Newport to Findings of Fact, Conclusions of Law and Order Dismissing Claim of F. P. Newport for Fees, filed Dec. 1, 1955.

5. Petition of Morris Lavine, as attorney for F. P. Newport and F. P. Newport Corporation, Ltd., for Review of Referee's Findings of Fact, Conclusions of Law, Order and Judgment, filed Dec. 1, 1955.

6. F. P. Newport's Petition for Review of Referee's Findings of Fact, Conclusions of Law, Order and Judgment, filed Dec. 1, 1955.

7. Reporter's Transcript of Proceedings before the Referee on Sept. 19, 1955, filed Sept. 26, 1955.

Dated: December 6, 1955.

REUBEN G. HUNT,
Referee in Bankruptcy.

United States District Court, Southern District of California, Central Division.

Memorandum Opinion on Review.

Filed Dec. 23, 1955.

In the Matter of F. P. Newport Corporation, Ltd., a corporation, Petitioner. No. 25308-Bkcy.

APPEARANCES: For the Petitioner: Morris Lavine, Esq., Los Angeles. For the Trustee: Bailie, Turner, Lake & Sprague, By Norman Bailie, Esq., Los Angeles, California. For the Bank of America: Edmund Nelson, Esq., Los Angeles, California.

YANKWICH, Chief Judge:

The involved history of this bankruptcy was given in a prior opinion, In Re F. P. Newport, D. C. Cal., 1954, 134 F. Supp. 95. Before me is petition to review an Order of the Referee denying the petition of F. P. Newport, a controlling stockholder of the bankrupt, for fees under claimed contract and for extraordinary services.

The provisions for reviewing the orders of a Referee by petition must be complied with. (Bankruptcy Act, §39(c); 11 U. S. C. A. §67(c); In Re Finkelstein, D. C. Pa., 1925, 3 F. 2d 1006; California State Board of Equalization v. Sampsell, 9 Cir., 1952, 196 F. 2d 252). The petition for review is signed by Newport's attorney. However, its text indicates that it is taken on behalf of Newport, the "person aggrieved." (Bankruptcy Act, §39(c), 11 U. S. C. A., §67(c)). So we consider the petition as though signed by the "aggrieved party,"[1] More, an administra-

---

[1]In Re DuPont Young Mfg. Co., D. C. Mass., 1923, 290 F. 393, which the Referee cites in his certificate, the petition signed by the attorneys did "not disclose on whose behalf they acted." (p. 394) Here the petition *does* disclose that the attorney acted for Newport.

trative matter relating to fees may be reviewed even in the absence of a formal petition. (See Goodman v. Street, 1933, 9 Cir., 65 F. 2d 686).

The petition was filed with the Clerk of the Court on November 23, 1955, or within *ten days* after the Order. It was timely. The filing with the Clerk was a filing with the Referee. (Bankruptcy Act, §51(4); 11 U. S. C. A., §79(4); General Order 20; In Re Sadler, D. C. Cal., 1952, 104 F. Supp. 886, 889). More, this Court has the right to entertain a review filed out of time. (Bankruptcy Act. §39(c); 11 U. S. C. A., §67(c); Pfister v. Northern Illinois Finance Corp., 1942, 317 U. S. 144; In re C & P Co., D. C. Cal., 1945, 63 F. S. 400, 403-404; Oppenheimer v. Oldham, 5 Cir., 1949, 178 F. 2d 386, 390).

By the same token there is no merit to the contention of the petitioner that he was entitled to a hearing upon his objections to the Referee's findings. Our Local Rule 7 which applies to findings of Referees as well as to findings of the Court specifically provides:

> "If objections are filed within the time limited herein, the judge may thereafter require the attorneys interested to appear before him or he *may sign* the document as prepared or as modified by him."

This provision has never been interpreted as making a hearing *obligatory* whenever objections to findings are filed. Indeed, such hearings are a rarity. The Court either signs the findings as proposed or modifiies them if the objections are valid, without a hearing. However, on review, the objections may be considered in order to determine the sufficiency of the findings. So considered, we find the objections made here to be without merit. The findings of the Referee here under attack are amply jus-

tified under the law and the facts in the voluminous record with which we have had occasion to familiarize ourselves in the prior and present review.

The findings of a Referee are to be accepted unless they are clearly erroneous. (Rule 52(a), Federal Rules of Civil Procedure; General Order 47. And see, Yankwich, Impact of the Federal Rules of Civil Procedure on Bankruptcy, 1954, 42 Cal. L. Rev. 738, 743-744).

The Referee was correct in finding that the Order of Judge McCormick dated November 21, 1935, authorizing the then receiver to employ Newport at a salary of $250.00 per month until "the further order" of the Court terminated when the Trustee was elected and qualified on February 23, 1937. The Bankruptcy Act then in force had a provision identical with the present one which limits the power of the Court to appoint a receiver "until it (the petition) is dismissed or the trustee is qualified." (Bankruptcy Act, §2(3); 11 U. S. C. A., §11(3)). The receivership terminated upon the appointment of the Trustee. (In Re Olsen, 2 Cir., 1934, 70 F. 2d 253; Levin v. Barker, 8 Cir., 1941, 122 F. 2d 969, 973). And the Bankruptcy Act specificially provides that upon the appointment of the Trustee, he shall

> "(1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest;" (Bankruptcy Act, §47(1); 11 U. S. C. A. §75(1)).

After the Trustee qualifies the only duties which the Receiver can perform are to file his accounts and turn the property over to the Trustee. And the Court cannot confer

upon the Receiver duties which only the Trustee can perform. (Stanton v. Busch, 9 Cir., 1932, 59 F. 2d 668, 669).

The Bankruptcy Act limits the compensation of receivers. (Bankruptcy Act, §48(1)(2); 11 U. S. C. A., §76(1)(2). There can be no recovery of fees unless the employment is authorized. (In Re Owl Drug Co., D. C. Nev., 1936, 16 F. Supp, 139, 147-149).

> "Estates should not be unnecessarily burdened with the expenses of a receivership after the appointment of a trustee in bankruptcy." (Levin v. Barker, *supra*, p. 973).

Receivers, or their attorneys, cannot be paid compensation unless appointed in compliance with the provisions of the Bankruptcy Act or General Orders 40, 42, 44 and 45. (In Re Eureka Upholstering Co., 2 Cir., 1931, 48 F. 2d 95; In Re Joslyn, 7 Cir., 1955, 224 F. 2d 223).

We consider the issues presented in the light of these principles. With the election of a trustee the Order of Judge McCormick came to an end, it became *functus officio*, as the phrase is. Newport's employment by the Trustee required a new Order. The persons connected with the estate, including Newport, shared this view. For on May 15, 1937, the Trustee petitioned the Referee *for authorization to employ* Newport. This was granted by Order dated May 17, 1937, which authorized the employment of Newport at a salary of $250.00 per month, the employment and salary to continue "so long as F. P. Newport shall be employed *by said Trustee* or until the further Order of this Court." (Emphasis added). This contemporaneous interpretation of the Order of Judge McCormick conforms to the view of the law stated in the decisions referred to. So there is no substance to the

argument that the Order of Judge McCormick continued in effect *despite the superseding* Order of the Trustee. Under the very wording of the Order, the employment could be terminated *either by the Trustee* or by the Referee. It was terminated by the Trustee as of December 1, 1943, by letter dated November 26, 1943. The letter clearly indicated that the cash position of the company prompted this action. Significantly the Trustee inserted this clause:

> "Should you care to bring this up for review, it will be quite all right with the writer whatever disposition the Court sees fit to make of it."

No petition to review was ever filed. A statement filed in the case shows that Newport was paid $5,597.53 during the receivership and $19,745.35 during the trusteeship. The latter amount Newport retained under an Order which he now claims the Referee had no right to make. When to this are added certain allowed expenses and commissions of sales we have a total of $25,466.62. The Referee was asked to make an additional allowance of $31,750.00 as unpaid salary from November 30, 1943, to May 3, 1954, at the rate of $250.00 per month.

The Referee was right in rejecting the claim. Regardless of the wording of the Order of Judge McCormick, the selection of a trustee following adjudication *automatically* terminated the powers of the receiver including the power to employ Newport. More, it would be inequitable to hold that because an Order provided that it "shall continue until the further Order of this Court" a person may *consent* to the substitution of another employment by a different officer of the Court, *accept* substantial fees under it, *acquiesce* in its termination, *stand* mute for eleven years and make no claim, and then, *after having unsuccessfully*

attempted to prevent liquidation of the estate by sale, claim accumulated back salary under an expired Order.

As the controlling stockholder of the bankrupt corporation, Newport was interested in preserving the assets of the estate and it was his duty to help do so. (Bankruptcy Act, §7, 11 U. S. C. A., §25). He kept the estate in bankruptcy for over nineteen years. Even at the last moment, as the previous opinion shows, he resisted liquidation. Granted that the delay may have turned what was a bankrupt estate nineteen years ago into a solvent estate, it was just as much to the interest of his corporation to preserve its good name by realizing the greatest value for its assets as it was that of the creditors to be paid their claims in full. Indeed, throughout the proceedings, Judges and Referees seemed to have listened to the plea that eventually the problems which led to bankruptcy would be solved if time enough was given. They were, therefore, very lenient. A liquidation by sale was ordered only when it became apparent that without it there could be no foreseeable termination of the bankruptcy. Nor do we see any justification in the record for the allowance of some $208,850.00 or any part of it for alleged extraordinary services and expenses. No written Order was ever asked for or made agreeing to compensate Newport for any extraordinary services during the contractual period with the trustee and receiver or thereafter. The Referee was right in rejecting any offer to prove an oral understanding with the Receiver and Trustee, *now dead*, that compensation was to be paid over and above the minimum allowed. Agreements of this character, whether relating to the services of attorneys or others, are not binding on the Court, are contrary to public policy and to the policy of the Bankruptcy Act. (See, General Orders 40, 42 and 44; Albers v. Dickinson, 8 Cir., 1942, 127 F. 2d 957, 961; (cited with

approval by the Court of Appeals for the Ninth Circuit in Beecher v. Leavenworth State Bank, 9 Cir., 1950, 184 F. 2d 498, 501; Weil v. Neary, 1929, 278 U. S. 160, 172-174; Crutcher v. Logan, 5 Cir., 1939, 102 F 2d 612; Cox v. Elliott, 8 Cir., 1941, 122 F. 2d 851).

In interpreting the Bankruptcy Act, courts have rejected repeatedly the contention that, in the *absence of specific* prohibitions in the Bankruptcy Act, the bankruptcy court, in the exercise of equitable powers, *may* allow compensation in extraordinary cases. Illustrative of this attitude are the following quotations from cases decided *under the prior* and *present* Bankruptcy Acts:

> "The Bankruptcy Act carefully regulates the compensation and expenses which may be allowed in bankruptcy. * * * *The general policy of the act denies compensation unless expressly provided.*" (In Re Realty Associates Securities Corporation, 2 Cir., 1934, 69 F. 2d 41, 42) (Emphasis added).

> "The present Bankruptcy Act *plainly endeavors to restrict allowances* from the bankrupt estate. In Re Realty Associates Securities Corporation (C. C. A.) 69 F. (2d) 40; In re Kinnans Co.'s Estate (C. C. A.) 242 F. 769." (In Re First Bond & Mortgage Co., 5 Cir., 1935, 74 F. 2d 930, 932) (Emphasis added).

> "But passing this weakness in the appellant's case, he encounters the rule which this court has frequently enforced that no compensation can be allowed for 'administrative' services unless *the person performing them obtained authority from the court in limine.*" (In re Postal Telegraph & Cable Corp., 2 Cir., 1941, 119 F. 2d 861, 863).

> "Were it the law that creditors who voluntarily perform acts which prove to be beneficial to the estate should or must be allowed compensation, courts of

bankruptcy would be confronted in many instances with numerous claims for compensation for 'voluntary' assistance. In re Owl Drug Co., D. C. Nev., 1936, 16 F. Supp. 148." (Cox v. Elliott, *supra*, p. 852).

Behind the rule is the desire to discourage *duplication* of services:

"For administrative reasons Congress has wisely provided that the trustee shall have sole responsibility for administering the estate." (In Re Joslyn, 7 Cir., 1955, 224 F. 2d 223, 225).

"* * * Another expression of the same principle is the familiar rule that an officer is expected to perform his duties personally and not through the agency of another person who in turn would look to the estate for compensation. No duplication of expenses through trespassing on another's assigned field of duties, and equally none through voluntary delegation of powers or duties." (Collier on Bankruptcy, 14th Ed., 1954, Vol. 3, pp. 1426-1427).

And see the writer's opinions In Re Owl Drug Co., *supra*, pp. 147-149, and In Re Alta Vineyards Co., D. C. Cal., 1949, 87 F. Supp. 608; Gochenour v. Cleveland Terminals Bldg. Co., 6 Cir., 1944, 142 F. 2d 991, 994-995; Beecher v. Leavenworth State Bank, 9 Cir., 1950, 184 F. 2d 498, 501; In Re Joslyn, *supra*, p. 225.

In the circumstances, both on legal and equitable principles, the Referee was right in denying additional compensation and in dismissing the claim with prejudice. His Order is affirmed.

Dated this 23rd day of December, 1955.

LEON R. YANKWICH,
United States District Judge.

United States District Court, Southern District of California, Central Division. Honorable Leon R. Yankwich, Judge.

Decision on Review.

Filed Dec. 23, 1955.

In the Matter of F. P. Newport Corporation, Ltd., a corporation, Petitioner. No. 25,308-Bkcy.

The petition of F. P. Newport Corporation, Ltd. and F. P. Newport to review the Order of the Referee dated November 15, 1955, denying the claim of F. P. Newport for fees alleged to be due under contract of employment and for extraordinary fees, heretofore heard, argued and submitted, is now decided as follows:

Upon the grounds set forth in the memorandum opinion this day filed, the Order of the Referee dated November 15, 1955, denying F. P. Newport fees under claimed agreement and for extraordinary services is hereby affirmed. The Court adopts the findings of the Referee, except insofar as they relate to timeliness of review. Formal Order to follow.

Dated: this 23rd day of December, 1955.

LEON R. YANKWICH,
Judge.

In the District Court of the United States, Southern District of California, Central Division.

Order Affirming Order of Referee Dismissing With Prejudice Petition of F. P. Newport for Allowance of Compensation for Alleged Services.

Filed Dec. 27, 1955.

In the Matter of F. P. Newport Corporation, Ltd., a corporation, Bankrupt. In Bankruptcy No. 25308-Y.

Honorable Reuben G. Hunt, Referee in Bankruptcy, having heretofore on November 15, 1955, signed and filed his Findings of Fact, Conclusions of Law and Order, dismissing with prejudice the petition of F. P. Newport for compensation for services alleged to have been performed by him for the benefit of the estate of the above named bankrupt; and said F. P. Newport, and Morris Lavine, Esq. attorney for F. P. Newport Corporation Ltd., and for F. P. Newport, having filed, within the time allowed by law, their petitions to the above entitled Court for review of said Findings of Fact, Conclusions of Law and Order; said review came on regularly to be heard on December 19, 1955, at 10 o'clock A.M. before the Honorable Leon R. Yankwich, Chief Judge of said Court, pursuant to notice of the time and place of said hearing duly and regularly given as provided by law.

The Trustee herein, Paul W. Sampsell, appeared by his counsel Messrs. Bailie, Turner, Lake & Sprague by Norman A. Bailie, Esq., Bank of America National Trust and Savings Association, an unsecured creditor, appeared by its counsel Edmund Nelson, Esq. and Winfield Jones, Esq., and F. P. Newport, and Morris Lavine, Esq. attorney for F. P. Newport Corporation, Ltd. and F. P. Newport appeared by Morris Lavine, Esq. The Court, being

familiar with the record on review and other records of this proceeding, and having heard the arguments of counsel and being fully advised in the premises, makes and files his Order on said review as follows:

IT IS HEREBY ORDERED:

1. That the Findings heretofore made herein by the Referee are hereby adopted as the Findings of the Court.

2. That the Order of the Referee made and filed herein on November 15, 1955, dismissing with prejudice the petition of F. P. Newport for fees for alleged services to the bankrupt estate be and it is hereby confirmed.

Dated the 27th day of December, 1955.

LEON R. YANKWICH,
Chief Judge, United States District Court.